FILED
MAR 13 1952
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1951

No. 648

BRADLEY MINING CO., A Corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on December 5, 1951 (R 2225).

OPINION BELOW

The opinion of the District Court denying Motion for New Trial (R 116 ff.) is reported in 92 Federal Supp. 750. The majority and dissenting opinions of a panel of three judges of the United States Court of Appeals for the Ninth Circuit are not yet reported (R 2204 ff.; Appendix A hereto).

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1951 (R 2225). A petition for rehearing and rehearing en banc, filed in time, was denied on January 23, 1952 (R 2226). The jurisdiction of this court is invoked under Title 28 U.S.C.A. Sections 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether, in the trial of a case in a United States court, counsel may, with impunity, indulge throughout the trial in a planned and consistent scheme of appeals to passion and prejudice of the jury.

2. Whether, when such a departure from the accepted and usual course of judicial proceedings has resulted in a grossly excessive verdict, that verdict can be permitted to stand.

3. Whether the decisions of this court in *N. Y. C. Ry. Co. v. Johnson,* 279 U.S. 310 and *Moquin v. Minneapolis etc. Ry. Co.,* 283 U.S. 520, 75 L.ed. 1243 are to be emasculated and brushed aside by assuming the jurors were not misled by constant appeals to passion and prejudice through the introduction of inflammatory matter under the guise of unsupported "impeachment" cross-examination upon the assumption that jurors have intelligence enough to know (a) that if a party has evidence to impeach a witness he will produce it and (b) that statements, in the form of impeaching questions, in support of which no evidence was produced, were to be disregarded—when a grossly excessive verdict demonstrates that the assumption is wholly unwarranted.

4. Whether the trial court's failure to give relief on motion for new trial should be corrected because the trial court misconceived its function.

STATEMENT

Respondent brought this action against Bradley Mining Co. and John Bradley, its Executive Vice-President, for $50,000 for damages for false imprisonment and $100,000 damages for slander (R 3-13). No special damages were alleged or proved. The cause was concluded in favor of the individual defendant (R 2187) and by a verdict against the corporate defendant, the petitioner here, for $60,000 (R 109). Motion for new trial was denied (R 116 ff.). The appeal to the Court of Appeals for the Ninth Circuit was submitted to a panel of three—Judges Healy, Bone and Pope. The judgment was affirmed by two judges—Judge Pope dissenting (R 2204 ff.; Appendix A hereto). A petition for rehearing and a hearing en banc before the seven judge court was filed and denied by the same two judges who had affirmed the judgment (R 2226). The dissenting judge's characterization of the whole case was:

> "In my opinion a very thin case has here been whipped into a monstrosity".

The dissent was on the ground that the verdict was excessive and was the result of appeals to passion and prejudice, which that opinion states and documents in detail. The most that the majority could say of this conduct of counsel was:

> "One need not approve tactics of this sort in order to reject appellant's argument."

These opinions are attached in Appendix A hereto.

To understand the point of the foregoing a summary statement of matters which occurred over a period of more than nine months and which were made to appear at a five-week trial is necessary.

Stibnite is a small mining town in a remote region of the mountains of Idaho. The streets and alleys were public but the rest of the property was owned by Bradley Mining Co. and, with one or two exceptions, the inhabitants were employees of the company or members of the families of employees. The employees, in matters of common concern, dealt with the company through a formally constituted "Employees' Representative Committee" (R 374-384, 405, 406).

Agreeably to the Idaho statutes (Idaho Code 72-397 to 72-309) the company and the employees had entered into a contractual plan for medical service, and a second plan covering wives and children of employees. In 1943 the company opened a hospital at Stibnite. All the company's employees and members of their families were members of the medical plans.

Respondent, a doctor licensed to practice in Texas, and a stranger to Stibnite, began service March 1, 1947, as the doctor in charge of the Stibnite Hospital. At first he seemed to do well enough. But at the end of about three months marked laxity and inattention to duty began to manifest itself. The record is filled with general statements and specific instances in too much detail for summary here. Patients' complaints began in July. Eventually the matter was taken up by the Employees' Representative Committee. In November, it adopted a resolution, critical of the doctor. It and company officials conferred with the doctor. The

situation was not cured. There were further conferences with the Employees' Representative Committee, unfulfilled promises to improve, and additional complaints. The situation got progressively worse. Respondent's conduct became erratic and bizarre. In January, petitioner took steps to find a new doctor.

Respondent's inattention to duty and complaints from patients and nurses continued. Because of respondent's conduct one registered nurse resigned on February 14, 1948. On March 31, 1948, due to respondent's behavior, the registered nurse who had been head nurse at the hospital since its inception resigned and the hospital was without a registered nurse for 22 days. Two new registered nurses came in. Still the hospital was not operated properly. The men at the mill began circulating a petition to have the doctor removed. Respondent's employment was terminable on 60 days notice (Ex. No. 10, 11, R 225, 232) and finally, on April 30, 1948, petitioner was forced to give respondent 60 days notice of termination (Ex. No. 2, R 196).

Immediately thereafter, in the early part of May, respondent performed an operation on a Mrs. Bishop in which there was a shocking want of proper technique and care. *On May 13, the doctor performed an operation on a Mrs. Wood in which he removed a living fetus—which, by his own admission he later secreted in his apartment, placed in a pickled peach jar and buried in the ground.* His own testimony was that he did not know that the woman was pregnant. But see Judge Pope (App. A, p. 7)—"One of the nurses protested before the operation that the woman appeared to be pregnant, but the doctor, without making any tests for pregnancy, nevertheless proceeded with the operation".

On the morning after the Wood operation, the head nurse made a complete report to the company officials and also stated that respondent was contemplating a similar operation on another pregnant woman in the hospital. We make reference here to Judge Pope's judicial statement as to the sequence of events (App. A, p. 7 ff.):

> "The head nurse testified that another patient in apparently the same condition as the woman thus operated upon was then in the hospital awaiting a similar operation. The nurse became much agitated about the incident just described and she went to the officials of the company advising them that in her opinion some "mad surgery" was going on; that the Mining Company was likely to be held responsible for some of the consequences and that the doctor should be removed from his responsibilities at once.
>
> It was following this report that the company officers called the Idaho Department of Public Health which immediately sent a representative of the department and a physician member of the Hospital Advisory Board to Stibnite. The company officials then approached Dr. Boice, and in the presence of these persons demanded that he quit his employment and that he leave town at once. It was in the course of the ensuing argument with Dr. Boice that the company officers are said to have expressed the opinion that the doctor was mentally ill and insane and to have stated he had performed an illegal operation.
>
> The charge of slander arises out of these remarks. At first the doctor declined to accede to any termination of his employment and stated that he proposed to continue. It was then that a guard was stationed at the door leading from the apartment to the hospital to keep the doctor from entering the hospital. It was claimed that at the same time guards were placed near

other outside doors of the apartment to prevent the doctor from leaving the apartment at all. It is not claimed that the imprisonment lasted more than a few hours, for during the evening following the time mentioned the doctor and his wife left the apartment and went about the town without any difficulty or interference. After some argument which followed the demand for Dr. Boice's immediate departure, he was finally paid compensation for a sixty day period which included compensation for the loss of the use of the apartment, and the doctor and his wife took their belongings and left Stibnite".

Judge Pope further states "The evidence of imprisonment was exceedingly flimsy".

As to the claimed slander, in addition to the above characterization of respondent's "mad surgery", four disinterested graduate registered nurses gave detailed testimony regarding respondent's inexplicable and frequent erratic and eccentric conduct and demeanor. This testimony—corroborated by many other witnesses—was neither denied nor impeached in any manner.

In this connection Judge Pope found (App. A, p. 9)

"But, with respect to the amount of damages, the Mining Company had the right, under the Idaho statute, to show the matters testified to by the nurses by way of mitigation. What impresses me is that the testimony of these four graduate registered nurses was not impeached in any manner. They were wholly disinterested when they testified, none of them is shown to have had any motive to misrepresent, and what is more, their testimony was not even denied. Under these circumstances, I think the court was obliged to assume that their testimony was true and, if it was

true, *there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties.*

I think also it cannot be questioned but that when these matters were called to the attention of the Mining Company, its officers were justly and reasonably alarmed about the situation in view of the company's responsibility under its hospital management. The company officers would properly assume that the training in discipline of a graduate nurse is such that she would not be likely to question a doctor's actions unless his conduct had become actually shocking. . . .

I would be inclined, without more, to say that the verdict of $60,000 under the circumstances of this case is grossly excessive and monstrous." (Emphasis ours).

There was not a word of testimony which would support any finding of damage in fact. The chief actor in the episode over the weekend of May 14-16, 1948, for petitioner, was its Executive Vice-President, Mr. Bradley. The jury returned no verdict as to him and by stipulation the case was disposed of in his favor.

The jury, however, returned a verdict of $60,000 against the petitioner corporation—Why? The obvious answer of jury prejudice against the company lies in the tactics of respondent's counsel.

During the whole course of the trial the attorneys for respondent, in cross-examination ostensibly for the purpose of impeachment, introduced matters derogatory of petitioner before the jury—for which there was no evidence—for which they never attempted to produce any evidence—thus introducing by "impeachment" highly inflammatory matters whose only purpose could have been to create jury prejudice.

See Judge Pope (App. A, p. 10):

> "In my opinion the record is so filled with matters improperly injected on behalf of appellee as to demonstrate what I can only conclude were deliberate efforts to make appeals to the passion and prejudice of the jury. One of these instances is mentioned in the opinion of the majority, who apparently treated it as an isolated instance, of trifling consequence. I do not so read the record."

This "isolated instance of trifling consequence" was the interjection of religious prejudice on cross-examination carrying the totally unsupported insinuation that the mine manager had, in a conference with respondent, rejected an applicant for head nurse on the ground that she was Jewish and a Jewish refugee (R 1602, 1603):

> "Q. She was a **Jewish refugee**, was she not?
>
> A. I don't know.
>
> Q. Isn't it a fact that you said Miss Hirst would not fit into the picture at Stibnite, and 'You better forget her'?
>
> A. No, sir.
>
> Q. You don't recall saying that—saying that inasmuch as she was **Jewish**, and a **Jewish refugee**, that she would not fit into the life at Stibnite and that you may as well forget her?
>
> A. Nothing was said about being Jewish."

In a footnote, the majority stated (App. A, p. 3):

> "In one instance, it is claimed that counsel attempted to inject a religious issue in the course of cross examination. We have considered this incident and regard it as of no more than trifling consequence. In any event it was not objected to at the time".

But how effective is an objection to cross-examination whieh apparently is for *impeachment* purposes? See the following cross-examination of Mr. Zarybnisky (R 1418, 1419):

"Q. Do you know Mr. and Mrs. Cliff Ross?

A. Yes, sir.

Q. Were they at your home on Saturday?

A. I don't remember.

Q. Were they at your home on Sunday?

A. They were at our home.

Q. Do you remember—on Sunday going into their home and in the presence of Mr. and Mrs. Cliff Ross and your wife, stating that you had just been told that 'Doc had gone crazy'?

"A. I don't remember.

Mr. Breshears: We object to this, there is no connection with management or any of the defendants here.

"Mr. Hawley: *It is for the purpose of impeachment.*

The Court: *You may ask for that purpose.*

Q. *Do you remember on that occasion that you said Doc had gone crazy, and that you had instructions to keep him under guards, and that you had instructions to shoot him down like a dog if he got funny?*

A. No, sir, I don't."

This it will be noted is an instance where the right of counsel for respondent to ask the question was challenged by objection, and counsel made the specific promise to the court that he would follow through with the necessary proof.

Neither Mr. nor Mrs. Ross, nor any other witnesses who were put on the stand, substantiated counsel's "purpose of impeachment" as promised the court. Ccunsel's purpose

was obviously without foundation, to get over the effect of the *question* to the jury.

It is conceivable that one or two instances of inadvertent improper and inflammatory conduct could be overlooked. But the record in this case contains more than 50 similar appeals to passion and prejudice under the guise of "impeachment". Record references to these are set forth in Appendix B attached hereto. Judge Pope's opinion cites 20 specific examples and his conclusion is (App. A, p. 11 ff.):

> "The record here, however, shows a pattern of similar inquiries so repetitive, and so completely unsupported by any attempt to establish the suggested impeachment otherwise than by the mere asking of the questions, that the only fair conclusion, I think, is that they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise to passion and prejudice on the part of the jury. . . .
>
> Many other similar instances are listed and complained of by appellant. In no instance was any effort made to prove, by calling any other witness, that the suggested prior contradictory statement, or statement disclosing bias, had actually been made. The conclusion seems unavoidable that such questions were not asked in good faith, or in belief that they referred to any actual occurrence, or that any such statements had actually been made, but rather that they were asked in a studied attempt to prejudice the jury by the innuendo which was certain to be the effect of the mere interrogation. . . .
>
> The important fact is that this highly prejudicial matter was improperly before a jury which had produced a very large verdict. It serves to account for the size of the verdict. . . . It is all of the same stripe

as the conduct of appellee's counsel in having a witness relate, without any showing that it related to this case, a purported conversation between two of appellant's officers in which one asked "Do you think his word would stand up?" And the other replied, "No, he is just a common laborer". In like manner, a witness was asked if she knew that when the Boices left, Mrs. Boice was pregnant. No one testified to such a pregnancy. I cannot escape the conclusion that this question, and the conversation about "just a common laborer", and the question about a company official rejecting a proposed employee because she was Jewish, were all dragged in merely for their likelihood to cite passion and prejudice.

A jury cannot be expected to make a calm, judicious and fair appraisal of damages in such an atmosphere. It is apparent that this one did not. Where an excessive verdict thus results from passion and prejudice, the error cannot be cured by remittitur. A new trial must be granted, for the means employed at the trial "may be quite as effective to beget a wholly wrong verdict as to produce an excessive one". Minneapolis etc. Ry. v. Moquin, 283 U.S. 520".

Judge Pope's finding of the existence of appeals to passion and prejudice is actually confirmed by the majority panel opinion—see App. A, p. 3:

"The complaint is that the impeaching questions were not attempted to be followed up by evidence that the witness had in fact made the statement. One need not approve tactics of this sort in order to reject appellant's argument. We think that jurors are not so easily misled. They may safely be assumed to have intelligence enough to know that if a party has evidence tending to impeach an adverse witness he will produce

it. In sum, the instances of claimed misconduct cited are not thought to have had a substantial tendency to inflame the jury."

The short answer to the brushing off by the majority of these inflammatory jury appeals is that respondent's counsel did *not* produce evidence to support *any* of these numerous "impeachments".

Furthermore, we urge that every litigant is entitled to a fair and impartial trial; that verdicts of jurors should be rendered only on the issues made by the pleadings and the evidence, and that—where prejudicial and inflammatory matter is injected into a record and appeals made to passion and prejudice—it cannot be assumed that jurors are not misled thereby.

We also urge that such misconduct having *any* tendency to inflame the jury should not be approved—the test should be not that the prejudicial matter had a "*substantial* tendency to inflame", but that it had *any* tendency to do so.

With deference to the majority, we submit that it is difficult to conceive of any more flagrant or "substantially inflammatory" appeals to jury prejudice.

The trial judge, in passing on the motion for new trial, misconceived his functions,—assumed that it had no power or function to pass on the facts and assumed that its function was like that of an appellate court. (This is made clear by an earlier order reversed in *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561 (Circ. 9) decided after denial of the motion for new trial in the case at bar.)

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ should be granted for the following reasons:

1. The court below has decided an important question of federal law,—that courts of appeal should afford no relief where an excessive verdict in a federal court has resulted from improper appeals to passion and prejudice by members of the bar of a federal court in the course of the trial of a case,—in a way which is in conflict with *Minneapolis etc. Ry. Co. v. Moquin,* 283 U.S. 520, and *N. Y. C. R. Co. v. Johnson,* 279 U.S. 310. (Rule 38, 5(b).)

2. The court below has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such departure as to call for the exercise of this court's power of supervision (Rule 38, 5(b); see *Thiel v. So. Pac. Co.,* 328 U.S. 217, 225).

3. The petitioner was deprived of an essential element of trial by jury when the trial judge declined to exercise his independent judgment on the facts.

About two things there can be no question. (1) Excessive verdicts, or otherwise improper verdicts, resulting from appeals to passion and prejudice cannot be permitted ~~to~~ by stand. The *Johnson* and *Moquin Cases* put this beyond question. (2) There was, in this case, a planned and consistent course of appeal to passion and prejudice, indulged in by counsel for respondent. Judge Pope's opinion finds and documents this. The majority opinion concedes it. The only difference between the majority and the dissent was that the majority indulged in the assumption that these appeals had no effect upon the jury. The assumption flies in the face of the monstrous verdict and the judgment of

the men who tried the case, the attorneys for respondent who carried out a planned course of campaign. They did not do this because they assumed it would have no tendency to influence the jury. The only question is whether this is a matter of sufficient importance, in the administration of justice in the federal courts, for this court to review the matter. We believe it is and that this court, in forthright terms, should announce that where there is a planned course of action upon the part of lawyers trying a case to appeal to passion and prejudice, and influence the jury by derogatory and inflammatory matter, the tendency of such conduct is so dangerous that an appellate court should not be permitted to speculate that it may not have affected the jury.

It will serve nothing to spend time and effort in working out appropriate rules of substantive law if in their actual administration they are to be prostituted by denying to a party the right to have them impartially applied in a fair trial. Here is a case where action is necessary for the purpose "of correcting an absolutely plain injustice, in the interest of judicial administration itself." (*Louisville & N. R. Co. v. Botts,* 173 F.2d 164, 170 (Circ. 8).) The matter is of importance which far transcends this case. It goes to the very heart of the administration of justice. No verdict would be permitted to stand against a party if he were deprived of the right to be represented at the trial by counsel. That right involves the right to be properly and adequately represented. A party is not so represented if his opponent is permitted to obtain a verdict by methods which have been condemned repeatedly.

Moreover, a party whose case is tried by a jury, is deprived of his full rights to a trial where the trial court,

misconceiving its function, does not, on motion for new trial, exercise its own independent judgment upon the case as matter of fact. This is its function and duty, and its function and duty is wholly unlike that of an appellate court. (*Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251; *Capitol Traction Co. v. Hoff,* 174 U.S. 1; *Pleasants v. Fant,* 22 Wall. 116; *Aetna Casualty & Surety Co. v. Yeatts,* 122 F.2d 350 (Circ. 4); *General etc. Ins. Co. v. Central Nat. Bk.,* 136 F.2d 821, 823 (Circ. 6); *Reid v. Maryland Casualty Co.,* 63 F.2d 10, 12 (Circ. 5).) Where the trial court fails to perform its function it is guilty of an error of law which should be corrected on appeal. (*Felton v. Spiro,* 78 Fed. 567, 581 (Circ. 6—opinion by Taft, Lurton concurring, both later members of this Court); *General etc. Ins. Co. v. Central Nat. Bk.,* above; *Virginian Ry. Co. v. Armentrout,* 166 F.2d 400, 408 (Circ. 4). In this connection see Judge Pope's opinion, App. A, p. 13, note 8.)

This too is a matter of transcending importance in the administration of justice. Where the trial judge misconceives and, by consequence, does not fulfill his function there is departure from the accepted and usual course of judicial proceedings.

The record made in this case is clearly set forth by Judge Pope in his dissent, and unless this court in the exercise of its supervisory power over the administration of justice announces the rule that such conduct on the part of counsel for a litigant deprives the injured party of a fair and impartial trial and is grounds for reversal, it will be impossible to make the claim in any case that a record contains a basis for asserting that a verdict was induced by appeals to passion and prejudice.

The rule of the Ninth Circuit as promulgated by the majority of the panel deciding this case amounts to nothing less than a license which will permit counsel for a litigant in all cases to violate the rules of common honesty in the trial of a lawsuit and still be allowed to retain the fruits of his wrongdoing.

Settlement of the question by this court is plainly in the public interest since it could be involved in every trial.

The matters which we have presented are plain. The rules should not be permitted to be whittled away piecemeal. We suggest, with deference, that the function of this Court is not fulfilled by the mere announcement of rules. It has a responsibility to see that they are administered properly—to prevent a plain miscarriage of justice and abuse of process. This case appeals to that responsibility. We suggest that this Court should issue its writ of certiorari, as prayed.

Dated: March 11, 1952.

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRADLEY MINING COMPANY, a Corporation,
Appellant,
vs.
EDWARD H. BOICE,
Appellee.

No. 12,684
Dec. 5, 1951

Appeal from the United States District Court, for the District of Idaho, Southern Division

BEFORE: HEALY, BONE, and POPE, Circuit Judges

HEALY, Circuit Judge

This appeal is from a judgment against appellant in the amount of $60,000 in a suit claiming damages for slander and false imprisonment.

Much of appellant's argument here has been given over to factual contentions. The district judge in an opinion denying a motion for a new trial outlined the testimony supporting the verdict, 92 F. Supp. 750, and there is no occasion for our going over the same ground. All that need be said is that the evidence was such as to make the question of liability one for the determination of the jury. But appellant argues that in the form returned the verdict must be taken as a finding against appellee on all essential facts. Before turning to other points we will notice this claim.

In addition to the corporate appellant, its executive vice president, John Bradley, was made a defendant in the case. Bradley was personally in charge of all the Company activities giving rise to this suit. The verdict returned was against the Bradley Mining Company alone. It made no mention of John Bradley, either one way or the other. In this posture of affairs the court inquired of counsel whether they desired the jury to be returned to their room

to clear up their verdict as regards Bradley. Both sides replied in the negative.

Counsel's point here is that the case was decided by the jury in favor of the defendant Bradley, hence all questions of fact which were touched by his activities have been determined against appellee. No Idaho authority is cited in support of the argument, nor are there any citations of analogous decisions from other jurisdictions. Appellee calls attention to the California case of Lloyd v. Boulevard Express reported in 249 P. 837. The situation there was in principle on all fours with the present. The corporate defendant was held liable by the jury but no verdict was returned against its active and responsible agent, Mitchell, who was also a defendant. The court remarked [p. 838] that "the jury did not find either for or against Mitchell. It is the settled law in this state that the verdict of a jury against one of two defendants is not a verdict in favor of the other defendant. Such a verdict indicates simply that the jury failed to find upon the issues." The court added that since the corporate defendant noticed the omission and did not ask that the jury be required to find on the issue, it could not now be heard to complain. The California rule would probably be followed in Idaho.

Appellant's principal argument aside from an appeal to the evidence appears to be that the verdict was excessive and was arrived at as the result of passion and prejudice. There was enough evidence, certainly, if believed, to warrant the imposition of general damages in more than a nominal sum, both on the issue of false imprisonment and on the slander issue. Appellee produced testimony that armed guards were for a number of hours placed about his apartment with the view of circumscribing his movements. Consult in this connection Griffin v. Clark, 55 Idaho 364. Charges of insanity and of the performance by appellee of an illegal abortion—charges obviously slanderous per se—were testified to have been made in the presence of members of the general public under circumstances which the jury might properly have found rendered them unprivileged. Too, the jury might fairly have inferred from the record that appellant acted with actual malice, both in respect of appellee's imprisonment and in respect of the slanderous statements of its representatives. Concededly, under the local rule, the existence of malice in fact in a case like this warrants the imposition of punitive damages.

Apart from the mere size of the verdict, the claim of passion and prejudice is predicated on questions put to several of appellant's witnesses in the course of cross examination. These questions consist mainly of inquiries whether the witness under interrogation had or had not made a certain statement tending to impeach his testimony.[1] In each instance the witness denied having made the statement. The complaint is that the impeaching questions were not attempted to be followed up by evidence that the witness had in fact made the statement. One need not approve tactics of this sort in order to reject appellant's argument. We think that jurors are not so easily misled. They may safely be assumed to have intelligence enough to know that if a party has evidence tending to impeach an adverse witness he will produce it. In sum, the instances of claimed misconduct cited are not thought to have had a substantial tendency to inflame the jury. The cause was submitted to them under elaborate instructions carefully defining the applicable law in terms as favorable to appellant as it could reasonably have asked. There were no objections to the charge on appellant's part.

The power of this court in respect of verdicts claimed to be excessive is not coextensive with that of the district court. At most we may consider only whether the verdict is grossly excessive or "monstrous." Southern Pacific Company v. Guthrie, 9 Cir., 186 F. 2d 926, 931-33. When the trial judge is presented, as the judge was here, with a motion for a new trial grounded on a claim of excessive verdict, his power to deal with such a claim is not limited as ours is to questions of law. He may set aside a verdict when he thinks it is against the weight of the evidence or for other reasons he deems sufficient. In this instance the judge, familiar with the atmosphere of the trial and sensible of imponderables which might prejudicially affect the action of the jury, was satisfied that their verdict was motivated by the evidence alone and that it was not excessive. On the record before us, certainly we can not say that he was wrong.

Counsel argue that the court prejudiced their case by criticizing a hypothetical question propounded to medical witnesses whose

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[1]In one instance it is claimed that counsel attempted to inject a religious issue in the course of cross examination. We have considered this incident and regard it as of no more than trifling consequence. In any event it was not objected to at the time.

opinion was sought as to whether appellee had practiced medicine in accordance with standards obtaining in Idaho. The hypothetical inquiry was unusually lengthy. The court in the presence of the jury expressed the belief that it included a number of matters that could be of no aid to the witnesses in forming an opinion. Counsel now say that the court's remarks "not only destroyed the value of the expert medical testimony given in response to the hypothetical question, but also discredited the supporting testimony which practically constituted appellant's entire defense." Yet counsel made no such suggestion at the time or indeed at any time while the case was before the district court. They did not ask that a mistrial be declared, nor did they subsequently advance the remarks of the court as a ground for granting their motion for a new trial. We have nevertheless studied the hypothetical question and considered the judge's comments concerning it. The comments, we think, were not unwarranted. The question propounded appears argumentative, and it included, as the court observed, a number of matters that could not conceivably be of aid to a medical man in forming an opinion on the subject inquired about. Moreover the judge instructed the jury to disregard his remarks.

One other point will be noticed briefly. Appellant is a California corporation doing business in Idaho, and its co-defendant, Bradley, is a resident of California. The complaint alleged and the answer denied that plaintiff is a citizen and resident of Idaho. It is argued that no proof whatever was offered as to his being a citizen of that state or any other state, hence the requisite diversity was not shown.

There was no proof directed immediately to the issue, but we think it sufficiently appears from the record as a whole that appellee was domiciled either in Idaho or in Texas.[2] The evidence is that he was raised in the latter state and after schooling was admitted to practice medicine there. During the second world war he entered the armed services and was discharged in October 1946, after which he sought a location in the northwest. In January of 1947 he entered into a contract of indefinite duration with appellant to take charge of the latter's hospital at Stibnite, Idaho. Following the making of this arrangement he returned to Texas to

[2]The whole record may be looked to on this subject. Sun Printing & Publishing Assn. v. Edwards, 194 U. S. 377. There was enough proof, we think, to satisfy the jurisdictional requirement.

get his wife and children and to await the effective date of his employment, which was to be March 1, 1947. At that time he removed to Stibnite with his family and possessions, and resided there until May 15, 1948, when his contract was terminated by the company. At the inception of this employment he had applied for a license to practice medicine in Idaho and later was licensed by the state as a physician and surgeon. It casually appears from various items of evidence in the record that following his discharge at Stibnite he resided in Boise, where he was living at the time this case was filed and thereafter. Proof of residency in a state is usually thought prima facie evidence of domicile sufficient to shift the burden of proof. Cf. Kelleam v. Maryland Casualty Co., 112 F. 2d 940; Sherman v. Roosevelt Co., 48 F. Supp. 434; Tudor v. Leslie, 35 F. Supp. 969.

Affirmed.

POPE, C. J., dissenting.

The circumstances which gave rise to this action took place in connection with the termination of the employment of the appellee, a physician and surgeon, who had been employed by the Bradley Mining Company. The Mining Company operated mines at Stibnite, a remote mining town located in the mountains of Idaho. It had a contract with its employees under which it arranged to provide hospital and medical care not only in cases arising out of industrial accidents, but in all cases of illness of the employees or any members of their families. To accomplish this it had established and equipped a hospital, and Dr. Boice, the appellee, had been employed to manage the hospital and to provide the medical and surgical care required. The appellee was the only physician in the community.

The work in the hospital was handled by a number of nurses, selected by the doctor, but paid by the Mining Company, and there were generally at least two who were graduate registered nurses. Dr. Boice and his family were furnished an apartment which was directly connected with the hospital.

At the time of the trial all of the graduate registered nurses, who had been employed in the hospital during Dr. Boice's management, testified. At that time none of them was any longer employed

by or connected with the hospital or the Mining Company. Their testimony was all to the effect that it was exceedingly difficult to get the doctor to see patients who came to the hospital for advice or treatment; that on many occasions he refused to see or interview such patients; that on occasions employees injured in serious industrial accidents were brought to the hospital and the doctor refused to go near them for the period of several days; that he did not make regular rounds of the hospital to inspect those hospitalized there; that he insisted in giving oral directions for treatment and medication to the practical nurses and generally declined to give such instructions either to the head nurse or other graduate registered nurses in writing or by entries on the charts; that while he thus absented himself from the hospital he remained in his apartment and refused to see patients even when the nurses sought him out and requested his presence. During such times his wife, who was neither an employee nor a physician, made the hospital rounds in her husband's stead and undertook to give orders for treatment of the patients. The nurses testified as to how the doctor would schedule operations for morning hours, and then, after the patient had been prepared and wheeled into the operating room at the appointed time, the doctor would not appear until long after noon, and sometimes not at all on the appointed day.

The nurses testified that when it was necessary to procure directions from the doctor, they would proceed to the apartment in order to talk to him and that frequently the doctor was in the bathroom with the door closed, where he remained for long periods of time, and that they had to consult with him through the closed bathroom door. The nurses complained to Dr. Boice about the difficulty of procuring proper directions and about his refusal to see inmates and callers at the hospital but the situation did not improve. At times when the doctor was in the hospital and he was approached by a nurse in order to have him interview a patient, he climbed out of the window to get away from the nurse and avoid the interview. Some of the nurses furnished additional details, such as the doctor's permitting his children, his dog, and his pet ducks to wander about the hospital.

Finally, some of the nurses reported the unsatisfactory condition to the Mining Company officers stating they proposed to resign. They were requested to stay until some replacement could be found

for Dr. Boice. The contract of employment provided for termination of his two year term at any time on 60 days notice, and on April, 1948, he was given such notice.

Early in the following month he performed an operation said by him to be exploratory in character upon a woman who he said was suspected of having malignant cancer or tumor of the uterus. One of the nurses protested before the operation that the woman appeared to be pregnant, but the doctor, without making any tests for pregnancy, nevertheless proceeded with the operation. He performed a hysterectomy and removed the uterus which was found to contain a fetus which moved and kicked. The doctor admitted that he had not known that the pregnancy existed when the operation was performed, and the only point in controversy with respect to this operation was as to whether it was a six month or only a three month old fetus. The graduate registered nurses who were present and who saw the fetus and who had some years of training and experience in obstetrical techniques, testified that it was apparently a six-month fetus. The doctor proceeded immediately to dissect the uterus. The nurses were present as was a four year old child of the doctor during this procedure. Immediately thereafter the specimen disappeared and although in a short while much controversy arose about the operation, the specimen was not exhibited to any other person. The doctor admitted that he kept it in alcohol until after he left Stibnite, and that he buried it in the vicinity of a ranch where he stopped on his way out following his discharge.

The head nurse testified that another patient in apparently the same condition as the woman thus operated upon was then in the hospital awaiting a similar operation. The nurse became much agitated about the incident just described and she went to the officials of the company advising them that in her opinion some "mad surgery" was going on; that the Mining Company was likely to be held responsible for some of the consequences and that the doctor should be removed from his responsibilities at once.

It was following this report that the company officers called the Idaho Department of Public Health which immediately sent a representative of the department and a physician member of the Hospital Advisory Board to Stibnite. The company officials then approached Dr. Boice, and in the presence of these persons demanded that he quit his employment and that he leave town at

once.[1] It was in the course of the ensuing argument with Dr. Boice that the company officers are said to have expressed the opinion that the doctor was mentally ill and insane and to have stated he had performed an illegal operation.

The charge of slander arises out of these remarks. At first the doctor declined to accede to any termination of his employment and stated that he proposed to continue. It was then that a guard was stationed at the door leading from the apartment to the hospital to keep the doctor from entering the hospital. It was claimed that at the same time guards were placed near other outside doors of the apartment to prevent the doctor from leaving the apartment at all. The doctor himself testified that there were guards on those other sides of the apartment, but his wife gave no such testimony and other persons who were there saw no guards other than the one at the entrance of the hospital.

The charge of false imprisonment is predicated upon this claim that the apartment was surrounded by guards, and that when Dr. Boice and his family drove out of town the following Sunday night, an employee of the company followed to make sure that they did leave. It is not claimed that the imprisonment lasted more than a few hours, for during the evening following the time mentioned the doctor and his wife left the apartment and went about the town without any difficulty or interference. After some argument which followed the demand for Dr. Boice's immediate departure, he was finally paid compensation for a sixty day period which included compensation for the loss of the use of the apartment, and the doctor and his wife took their belongings and left Stibnite.

I have no difficulty in going along with the majority and with the trial judge upon the proposition that there was some evidence to prove an imprisonment[2] and that the defamatory remarks made in the presence of the Health Department representatives could be said to have been made before persons with respect to whom the rule of privilege would not operate.

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[1]Stibnite was a "company town" in the sense that substantially all of its inhabitants were company employees and their families, and substantially all of the houses and buildings were company owned.

[2]The evidence of imprisonment was exceedingly flimsy. I do not think there was any, but of course I am not a fact finder here.

But, with respect to the amount of damages, the Mining Company had the right, under the Idaho statute, to show the matters testified to by the nurses by way of mitigation.[3] What impresses me is that the testimony of these four graduate registered nurses was not impeached in any manner. They were wholly disinterested when they testified, none of them is shown to have had any motive to misrepresent, and what is more, their testimony was not even denied. Under these circumstances, I think the court was obliged to assume that their testimony was true and, if it was true, there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties.

I think also it cannot be questioned but that when these matters were called to the attention of the Mining Company, its officers were justly and reasonably alarmed about the situation in view of the company's responsibility under its hospital management. The company officers would properly assume that the training in discipline of a graduate nurse is such that she would not be likely to question a doctor's actions unless his conduct had become actually shocking.

The testimony of these nurses did not stand alone. It was corroborated by the testimony of several of the practical nurses, and the doctor's inattention to his work and many of the inexplicable aspects of his often erratic and eccentric conduct and demeanor were testified to by many former inmates of the hospital. Many of these patients were at the time of the trial either company employees or members of their families, but it is noteworthy that in general the circumstances related by them were not denied. The doctor himself was not called upon rebuttal after all this testimony had been adduced.

I would be inclined, without more, to say that the verdict of $60,000 under the circumstances of this case is grossly excessive and monstrous. As I read the testimony I think it is apparent that when Dr. Boice was told to leave, the officials of the company who talked to him were not only alarmed but had become so excited that

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[3] "In the actions mentioned in the last section, the defendant may in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances." Sec. 5-811, Idaho Code.

under the circumstances their method of approaching the doctor and demanding his departure was more abrupt and undiplomatic than it needed to be. I think that the only circumstances from which malice could be inferred in order to support an award of punitive damages is this unnecessarily harsh method of putting pressure upon him to leave, but I assume that there was sufficient evidence of malice to sustain an award of punitive damages, although the inference of lack of malice, I believe, is the stronger. Even assuming a permissible inference of malice, I think the award a monstrous one, wholly apart from the circumstances which I am about to mention.

In my opinion the record is so filled with matters improperly injected on behalf of appellee as to demonstrate what I can only conclude were deliberate efforts to make appeals to the passion and prejudice of the jury. One of these instances is mentioned in the opinion of the majority, who apparently treated it as an isolated instance, of trifling consequence. I do not so read the record.

For instance, appellee's counsel no doubt felt that they should in some manner undertake to break down the effect of the testimony of the nurses to which I have referred. They proceeded to do this by propounding to each of them certain questions, which, if answered in the affirmative, would have disclosed that the nurse in question was very biased against the doctor, or had made prior statements contradictory of her present testimony. Thus Miss Morton, the nurse who had reported the operation to the company officials, was asked: "Miss Morton, immediately after your arrival on the 29th of April or the next day, or within a day or two, you started to criticize Dr. Boice to other nurses, did you not?" She was also asked: "Were you not also talking to the patients and criticizing the doctor's treatment of the patients?" Both of these questions were answered "No, sir", and in answer to the second, the witness said "I used all the excuses I could manage to cover up for Dr. Boice not seeing his patients". Now, if counsel was possessed of any evidence of any such conduct on the part of Miss Morton as that suggested by the question, which would have tended to show substantial bias on her part, proof of that fact would have been admissible. Collinger v. United States, (7 cir.) 50 F. 2d 345; United States v. Beekman, (2 cir.) 155 F. 2d 580; 3 Wigmore Evidence (Third Edition) §1022. But no such testimony was adduced.

If only those two questions were involved, it is clear that their asking would be entirely proper, whether followed by other proof or not. I think it would be taken that counsel would be presumed to have asked them in good faith.

The record here, however, shows a pattern of similar inquiries so repetitive, and so completely unsupported by any attempt to establish the suggested impeachment otherwise than by the mere asking of the questions, that the only fair conclusion, I think, is that they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise to passion and prejudice on the part of the jury.[4]

The cross-examination of the other nurses followed the same pattern.[5] It was extended to other witnesses. A guard stationed at

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[4]Thus, still proceeding with the cross-examination of Miss Morton, she was asked: "Didn't you tell Mr. Provost [a hospital patient] that he should sue the doctor for malpractice?" Also, she was asked: "When the doctor asked you to leave didn't you tell him at that time that you were not working for him, and that he could not fire you, that you were working for Mr. Bailey?" Also: "Did you tell Helen Christensen that you were not employed by Dr. Boice but were employed by Mr. Bailey?" In each case the answer was in the negative. Some of the suggestions in these questions to Miss Morton were repeated in questions to other nurses. Mrs. Anaruk [formerly Miss Haskins] was asked: ". . . Were you ever present, during your period at the Stibnite Hospital, when Miss Jeanne Morton made statements to Mr. Provost criticizing Dr. Boice when Dr. Boice was not present?" The same witness was asked if Miss Morton had not told her she was hired "for the purpose of constantly checking on Dr. Boice and reporting back to [company officers]". Mrs. Richardson was asked: "Do you know whether or not Miss Morton, during that entire period, was extremely critical of Dr. Boice to you and the practical nurses and also the patients involved?"

[5]Nurse Anaruk was twice asked whether she had not, shortly after Dr. Boice left, stated to one Faye Anderson, that she "had never seen anything like the treatment accorded Dr. Boice by the Bradley Mining Company or their agents", and that she was going to quit because she "did not like the way they treated Dr. Boice". Nurse Lee was asked if she, about that time, did not go to Dr. Boice to express her sympathy, and did not then say "he was the best surgeon [she] had ever known". Nurse Kirshner was asked if she had not made two purported statements. If these statements had been made they would have indicated that this nurse told a Mr. Sims, while he was in severe pain, to get up and get out of the hospital, and that she made a similar statement to a Mrs. Baker, hospitalized for hypertension. The same nurse was asked if

the hospital door was asked about a conversation with a Mr. and Mrs. Ross. He was then asked: "Do you remember on that occasion that you said Doc had gone crazy, and that you had instructions to keep him under guard, and that you had instructions to shoot him down like a dog if he got funny?" Martin, the county attorney, was asked on cross-examination if he did not state to Dr. and Mrs. Boice that "it was silly for them to fight Mr. Bradley and his money."

These instances will serve to illustrate the method of cross-examination adopted by the doctor's counsel. Many other similar instances are listed and complained of by appellant. In no instance was any effort made to prove, by calling any other witness, that the suggested prior contradictory statement, or statement disclosing bias, had actually been made. The conclusion seems unavoidable that such questions were not asked in good faith, or in the belief that they referred to any actual occurrence, or that any such statements had actually been made, but rather that they were asked in a studied attempt to prejudice the jury by the innuendo which was certain to be the effect of the mere interrogation. As the Supreme Court of Montana said of a somewhat similar procedure, "Manifestly it was the questions and not the answers which counsel considered important." State v. Patton, 102 Mont. 51, 59, 55 P. 2d 1290, 104 A.L.R. 76. Cf. United States v. Nettl, (3 cir.) 121 F. 2d 927.

When the evidence came to a close and it then became apparent that appellee did not intend to produce witnesses to prove the statements thus insinuated in the questions, appellant might well have moved the court to direct the jury to disregard the questions. The Idaho court has held that without such a motion, the asking of the questions, or the failure of the court so to instruct, is not ground for a reversal,[6] although that court has labeled such a procedure as that indulged in by appellee's counsel here, as "unfair

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there was not friction between herself and the head nurse, Mrs. Johnson. Nurse Johnson was asked if she had not said of Nurse Kirshner that the latter "was in disgrace in the nursing profession".

[6]But as to whether, at such a late hour in the trial, the effect of the questions could be removed by an admonition, see United States v. Grayson, (2 cir.) 166 F. 2d 863, 871, Waldron v. Waldron, 156 U. S. 360, 383.

to a defendant", a practice which "ought not to be indulged in under any circumstances", State v. Boyatt, 59 Ida. 771, 784, 87 P. 2d 992, and as a "reprehensible practice", State v. Flitton, 52 Ida. 374, 378, 15 P. 2d 397.[7]

But as I read this record, I think it immaterial whether appellant, by not making such a motion, lost the right to demand a new trial for misconduct of counsel as such. The important fact is that this highly prejudicial matter was improperly before a jury which has produced a very large verdict. It serves to account for the size of the verdict. It is all of the same stripe as the conduct of appellee's counsel in having a witness relate, without any showing that it related to this case, a purported conversation between two of appellant's officers in which one asked "Do you think his word would stand up?" And the other replied, "No, he is just a common laborer". In like manner, a witness was asked if she knew that when the Boices left, Mrs. Boice was pregnant. No one testified to such a pregnancy. I cannot escape the conclusion that this question, and the conversation about "just a common laborer", and the question about a company official rejecting a proposed employee because she was Jewish, were all dragged in merely for their likelihood to cite passion and prejudice.

A jury cannot be expected to make a calm, judicious and fair appraisal of damages in such an atmosphere. It is apparent that this one did not. Where an excessive verdict thus results from passion and prejudice, the error cannot be cured by remittitur. A new trial must be granted, for the means employed at the trial "may be quite as effective to beget a wholly wrong verdict as to produce an excessive one." Minneapolis etc. Ry. v. Moquin, 283 U. S. 520.[8]

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[7]In a lengthy effort to justify his procedure, appellee cites decisions to the effect that the purpose of cross-examination is to show bias, to show previous contradictory statements, to place the witness in his proper setting, to modify or explain the testimony, etc. It is claimed that the cross-examination here was to show these things. The fallacy of that argument here is that none of those things were shown. They were only insinuated.

[8]I think, also, there is a nice question whether the trial judge did not erroneously refuse to exercise his discretion to grant a new trial, because he mistook his power to do so in a case where the verdict is against the weight of the evidence. In his opinion denying a new trial, after refer-

In my opinion a very thin case has here been whipped into a monstrosity. I think a new trial should be ordered.

(Endorsed:) Opinion and Dissenting Opinion. Filed Dec. 5, 1951, Paul P. O'Brien, Clerk.

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ring to the Constitutional right of trial by jury, he said: "If this mandate is to be obeyed the Court must proceed with caution when a motion such as is now before this court is considered, with the thought in mind that if the Court is going to set aside the verdict for no reason except that the court feels it is excessive, this constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the Court could supplant its opinion in place of the opinion of the jury." This sounds like the statement of the trial court which led to reversal in Felton v. Spiro, (6 cir.) 76 F. 576, which was cited with approval in Fairmount Glass Works v. Coal Co., 287 U. S. 474, 481. The Constitutional right to trial by jury, mentioned by the trial judge, includes the right to a trial under the direction of a judge empowered to grant a new trial when he believes the verdict is against the weight of the evidence. Capital Traction Co. v. Hof, 174 U. S. 1, 13. This is "one of the historic safeguards of that right." Aetna Casualty & Surety Co. v. Yeatts, (4 cir.) 122 F. 2d 350, 352. Cf. Southern Pac. Co. v. Guthrie, (9 cir.) 186 F. 2d 926, 932.

Appendix B

EXAMPLES OF INFLAMMATORY CROSS-EXAMINATION BY COUNSEL UNDER GUISE OF IMPEACHMENT

The numerous examples of inflammatory "impeachment" cross-examination, not followed up by counsel have been referred to in part in our brief, supra. For convenience in checking the record, these examples are set forth in this Appendix with citations to pages in the transcript.

(1) The interjection of religious prejudice into the cross-examination of Mr. Bailey, the mine manager, (as to a nurse applicant being turned down because she was a Jewish refugee) is mentioned in our brief—a full record statement of this follows — this took place during the cross-examination by appellee's counsel of Mr. H. D. Bailey relating to a conversation between Mr. Bailey and the Doctor regarding the hiring of Miss Morton, the head nurse (1602, 1603):

"Q. What did you do at the office after you got there with Dr. Boice?

A. The Doctor asked my opinion of the three nurses, and I told him that it was his affair, that he had to work with them, that it wasn't my affair at all.

Q. Did you go over the applications?

A. I didn't see the applications—he talked with them informally; there were no formal applications.

Q. Did he discuss their qualifications with you?

A. No, I don't think so.

Q. Do you recall Miss Hirst that was brought in?

A. I think she was one—she may have been there.

Q. She was a **Jewish refugee,** was she not?

A. I don't know.

Q. You remember the Doctor told you that in addition to her training that she had three years of medical training?

A. No, I don't remember that.

Q. And that she would be a valuable asset, would be a help to them?

A. As I recall the Doctor said Miss Morton had the better qualifications.

Q. Isn't it a fact that you said Miss Hirst would not fit into the picture at Stibnite, and 'You better forget her'?

A. No, sir.

Q. You don't recall saying that—saying that inasmuch as she was **Jewish**, and a **Jewish refugee**, that she would not fit into the life at Stibnite and that you may as well forget her?

A. Nothing was said about being Jewish."

Counsel put on no witnesses to testify to the above comment and Respondent himself did not take the stand on rebuttal.

Many other instances of similar cross-examination occur in the record—some amounting to testimony by counsel under the guise of impeachment, and others of unquestionable impeaching character—all without foundation in the record, with no attempt at substantiation by counsel. It is obvious, therefore, the counsel intended throughout cross-examination to influence the jury by reckless and groundless inflammatory cross-examination—substituting in effect counsel's own testimony for respondent's case.

(2) See the cross-examination of Mr. Zarybnisky (1418-1419):

"Q. Do you know Mr. and Mrs. Cliff Ross?

A. Yes, sir.

Q. Were they at your home on Saturday?

A. I don't remember.

Q. Were they at your home on Sunday?

A. They were at our home.

Q. Do you remember—on Sunday going into their home and in the presence of Mr. and Mrs. Cliff Ross and your wife, stating that you had just been told that 'Doc had gone crazy'?

A. I don't remember.

Mr. Breshears: We object to this, there is no connec- with management or any of the defendants here.

"Mr. Hawley: *It is for the purpose of impeachment.*

The Court: *You may ask for that purpose.*

Q. *Do you remember on that occasion that you said Doc had gone crazy, and that you had instructions to keep him under guards, and that you had instructions to shoot him down like a dog if he got funny?*

A. No, sir, I don't."

This it will be noted is an instance where the right of counsel for respondent to ask the question was challenged by objection, and counsel made the specific promise to the court that he would follow through with the necessary proof.

Neither Mr. nor Mrs. Ross, nor any other witnesses who were put on the stand, substantiated counsel's "purpose of impeachment" as promised the court. Counsel's purpose was obviously without foundation, to get over the effect of the *question* to the jury.

(3) Mr. Martin, the Valley County prosecuting attorney, was asked "Did you state it was silly for them to try to fight Mr. Bradley and his money?" (1326);

(4) Mrs. Keele, the Boices' housekeeper, was asked "Did you at a time in May of 1948, know that Mrs. Boice was *pregnant?*" (760).

Neither respondent nor Mrs. Boice, nor anyone else, testified as to any such pregnancy—nor is there anything

whatever in the record to indicate that the officials of the company were told, suspected, or knew of any such condition, if in fact it existed. This is another highly inflammatory instance of counsel's blueprint for prejudicing the jury.

Attention should be called here to the uncontradicted and unimpeached testimony of four graduate registered nurses and several practical nurses—and to the "impeaching" tactics of counsel. As to this see Judge Pope's comment (App. A, p. 9 ff):

> "But, with respect to the amount of damages, the Mining Company had the right, under the Idaho statute, to show the matters testified to by the nurses by way of mitigation. What impresses me is that the testimony of these four graduate registered nurses was not impeached in any manner. They were wholly disinterested when they testified, none of them is shown to have had any motive to misrepresent, and what is more, their testimony was not even denied. Under these circumstances, I think the court was obliged to assume that their testimony was true and, if it was true, there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties. . . . Appellee's counsel no doubt felt that they should in some manner undertake to break down the effect of the testimony of the nurses to which I have referred. They proceeded to do this by propounding to each of them certain questions, which, if answered in the affirmative, would have disclosed that the nurse in question was very biased against the doctor, or had made prior statements contradictory of her present testimony. . . . But no such testimony was adduced.

The record here, however, shows a pattern of similar inquiries so repetitive, and so completely unsupported by any attempt to establish the suggested impeachment otherwise than by the mere asking of the questions, that the only fair conclusion, I think, is that they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise to passion and prejudice on the part of the jury."

(5) Counsel's "impeaching" tactics reached a reckless peak in order to discredit Miss Morton—obviously due to the fact that she, as head nurse ~~for~~ with 17 years of wide experience, divulged to management facts which led the company to act immediately to complete the April 30th termination of respondent's employment. In addition to the examples given above, see the following "discredit by question" without any foundation (1025):

"Q. Miss Morton, immediately after your arrival on the 29th of April, or the next day, or within a day or two, you started to criticize Dr. Boice to the other nurses did you not?

A. No, sir.

(6) Q. Were you not also talking to the patients and criticizing the doctor's treatment of the patients?

A. No, I used all the excuses I could manage to cover up for Dr. Boice not seeing his patients." (1025)

Further steps were taken to introduce a "company spy" theory with regard to nurses to prejudice the jury—
(7) "Did you tell Helen Christensen that you were not employed by Dr. Boice but were employed by Mr. Bailey?" (Miss Morton 1022);
(8) "When the doctor asked you to leave, didn't you tell him at that time that you were not working for him and

that he could not fire you, that you were working for Mr. Bailey?" (Miss Morton 1113, 1114);

(9) "Is it not a fact that Miss Jeanne Morton stated to you during the period of your employment at Stibnite, that she was hired as head nurse ~~for~~ by B. F. Mahoney and H. D. Bailey for the purpose of constantly checking on Dr. Boice and reporting back to them?" (Mrs. Anaruk 1152).

(10) Mr. Mahoney, the personnel manager, was asked "As a matter of fact at times when nurses were employed there and got their slips from you, you told them to watch what was going on and report to you?" (487)

(11) "Were you ever present, during your period at the Stibnite Hospital, when Miss Jeanne Morton made statements to Mr. Provost criticizing Dr. Boice when Dr. Boice was not present?" (Mrs. Anaruk 1149)

(12) "Do you know whether or not Miss Morton, during that entire period, was extremely critical of Dr. Boice to you and the practical nurses and also the patients involved?" (Mrs. Richardson 1228)

To inflame the jury against the nurse witnesses—see

(13) "Didn't you tell Mr. Provost that he should sue the doctor for malpractice?" (Miss Morton 1025);

(14) "Had you, prior to May the 14th, 1948, known that there was a great deal of friction between Miss Morton, Dr. Boice and some of the nurses in the hospital?" (Mr. Mahoney 514);

(15) "Was it in the doctor's orders that he (Mr. Sims) was to receive this sedative for relief * * * didn't you refuse to give it to him?" (Miss Kirshner 833, 834);

(16) "Isn't it a fact that you told her (Mrs. Baker—a patient) in the presence of Helen Christensen, one of the nurses up there, that she should get out of the hospital,

that there was nothing wrong with her?" (Miss Kirshner 852);

(17) "Shortly after Miss Kirshner arrived at the hospital, do you recall telling Helen Christensen that she was in disgrace in the nursing profession?" (Mrs. Johnson 963);

(18) "Is it not a fact that Mrs. Bishop (the surgery patient in May, where plaintiff did not change his torn glove) had knowledge that Bradley Mining Company desired to terminate Dr. Boice's services, and that she insisted that Dr. Boice perform the operation prior to his leaving Stibnite?" (Mrs. Anaruk 1149);

(19) "Is it not a fact, that after the employment of Dr. Boice was terminated by the Bradley Mining Company you stated to Faye Anderson, within a few days thereafter, that you had never seen anything like the treatment accorded Dr. Boice by the Bradley Mining Company or their agents?" (Mrs. Anaruk 1146);

(20) "Is it not a fact that you told Faye Anderson, in the presence of other practical nurses, within a few days after Dr. Boice's termination at the Stibnite hospital, that you were going to quit your employment with the Bradley Mining Company because you did not like the way they treated Dr. Boice and that you wanted no part of a hospital setup where such a thing could happen?" (Mrs. Anaruk 1146).

(21) Nurse Lee was asked if she, about that time, did not go to Dr. Boice to express her sympathy, and did not then say "he was the best surgeon [she] had ever known." (1189)

Counsel put on no witnesses and no evidence to support or to follow through on the above questions which were denied. The plaintiff himself did not take the stand on

rebuttal, nor did his three nurse witnesses, Faye Anderson Nock, Helen Christensen, or Zina Gubser give one word of testimony to substantiate this "impeachment" cross-examination.

(22) To inflame the jury against the defendant company regarding the placing of guards in the hospital to keep plaintiff from the patients, defendant John Bradley was asked with regard to Mrs. Wood, from whom the fetus had been taken,—"As a matter of fact, as a result of delay in care and being without attention, this patient had a slight infection set in in her wound?" (Mr. Bradley 1837).

Counsel called Mrs. Wood and her husband in rebuttal but did not even attempt to fill in the suggested impeachment.

(23) Counsel went to great lengths to get before the jury a purported conversation between officials of the defendant company in which someone allegedly asked the question "Do you think his word would stand up?", with the answer "No, he is just a common laborer" (319, 345, 1676, 1824, 1943).

There was no showing whatever that this purported conversation—allegedly "overheard" by a witness in another room—had any relation to this case.

The same pattern of suggested and innuendo by cross-examination under the guise of impeachment occurs in at least 30 additional places in the record—there are in all over 52 such examples. See:

Defendant Bradley 1777, 1778, 1779, 1827, 1841; Mahoney —personnel manager—498, 499, 500, 501; Bailey—mine manager—1614, 1615-1619, 1625, 1639, 1640, 1677; Mrs. Keele—plaintiff's housekeeper—758, 759; Nurse Kirshner

852, 853, 854, 855; Nurse Johnson 960, 961, 965; Nurse Morton 1045, 1045-1055, 1077; Nurse Anaruk 1145, 1146, 1147; Nurse Lee 1188, 1189; Mossman—County Sheriff—1261, 1262; Logue—deputy Sheriff—1477, 1494; Dr. Lowe—a psychiatrist flown in by the Company—1962, 1963.

These matters wrongfully injected into the record were so inflammatory and prejudicial that the effect thereof could not have been removed by motions to strike or instructions to disregard. It was not possible to object to the questions asked ostensibly for purposes of impeachment.

If the appellant at the close of the case had moved that these matters be stricken, and the court had stricken each and every one and instructed the jury to disregard the same, such action would have served but to emphasize them.*

---

*"Indeed as experienced trial lawyers have often observed, merely to raise an objection to such testimony—and more to have the judge tell the jury to ignore it, *often serves but to rub it in.* Judge Frank in *U. S. v. Grayson* (C.C.A. 2) (1948) 166 F.2d 863, at 871.

"It certainly cannot be said that such testimony would not unconsciously affect the verdict however much the jury might be disposed to follow the instructions of the court." (*Lockhart v. U. S.* (C.C.A. 9) (1929) 35 F.2d 905)

Inflammatory matter injected into a record may be so prejudicial that its sting cannot be removed by admonition or instruction. See *Waldron v. Waldron,* 156 U.S. 360, 383.

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In the Supreme Court of the United States

OCTOBER TERM 1951

No. 648

BRADLEY MINING CO., A Corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM 1951

No. 648

BRADLEY MINING CO., A Corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court denying the motion for a new trial (R. 116 ff.) is reported in 92 F. Supp. 750, (1950) (Appendix A hereto). The opinion of the Court of Appeals for the Ninth Circuit, and the dissenting opinion (R. 2204 ff.) are reported in 194 F. (2d) 80 (Adv. Sheets) (1952). The petition for rehearing and rehearing en banc was denied (R. 2226).

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1951 (R. 2225). The petition for rehearing and rehearing en banc was denied on January 23, 1952 (R. 2226). The petition for certiorari was filed on March 13, 1952. The jurisdiction of this court is invoked under under Title 28 USCA, Sections 1254 (1) and 2101 (c).

QUESTIONS PRESENTED

Although petitioner has classified its questions in its petition in four paragraphs, there are in fact only two questions presented:

1. Whether the trial court correctly determined, as approved by the Court of Appeals, that the verdict of the jury was not motivated by passion or prejudice;

2. Whether the trial court, as approved by the Court of Appeals, correctly conceived its function in denying the motion for new trial.

STATEMENT

Dr. Edward H. Boice, the respondent herein, was raised in Texas, and took his pre-medical education at Rice Institute in Texas. He received his medical degree from the University of Texas Medical School in 1942, which he followed with a one year internship at Jefferson Davis Hospital, and was then admitted to practice medicine in Texas. Refusing several offers of hospital residencies, he volunteered for the United

States armed services, entering on active duty July 12, 1943.

Dr. Boice had an excellent army record and was separated from the service on October 19th, 1946, holding then the rank of major. During his Army career he was attached to various large hospitals of the Air Corps.

At the time of leaving the Army he was married and had two children. Desiring to settle in the Northwest he made an extensive trip through that section of the country to investigate possible locations, and shortly after his return to Texas, negotiations were commenced which culminated in his employment by petitioner as a company doctor at Stibnite, Idaho, a remote mining town wholly owned by petitioner (R 336, 353, 389, 553). He moved to Stibnite with his family and possessions and assumed his duties about March 1, 1947 (R 137-144). A large part of petitioner's statement of the facts is devoted to occurrences prior to May 13, 1948, as was also several weeks of the trial by petitioner in putting in its defense. Any possible relevancy of this mass of evidence was resolved by the jury in favor of respondent. Most of it merely establishes that petitioner was dissatisfied with respondent's services and was an attempted justification of its discharging him, a point which never has been, and is not now, an issue in the case. The five separate slanders of respondent by petitioner, and the two occurrences of false imprisonment of respondent by petitioner occurred on the week end of May 13, to May 16, 1948, a period subsequent to the sixty-day notice of

termination of employment given by petitioner to Dr. Boice on April 30, 1948.

On May 13, 1948, respondent, fearful of malignancy, performed an exploratory laparotomy on Mrs. Hazel Wood. After the abdomen was opened he determined that she had cancer of the uterus and right ovary, and removed the uterus, ovaries and tubes (R 1345, 1347). A subsequent dissection of the uterus disclosed a fetus of the age of three months or less (R 1388).

This operation is the excuse offered by petitioner for its subsequent outrageous conduct and malicious persecution of respondent and his family, and even now it is the attempted justification thereof by petitioner, and even by Judge Pope in his dissent. Both of them carefully overlooked the fact that Mrs. Wood had been very ill for a long time previous to the operation (R 2133), and that following the operation she gained weight and strength and was in excellent health (R 2137).

Miss Jeanne Morton, a hospital nurse, went to the company officials Friday morning May 14, 1948, and made her hysterical denunciations of Dr. Boice (R 1525).

Although Miss Morton had been employed at Stibnite for only about two weeks, these officials, without any investigation of her astounding charges, accepted her word and put into execution their scheme to hound respondent and his family out of town (R 514, 1615, 1634, 1651, 1814), characterized by Judge Pope in his dissent as "this unnecessarily harsh method of putting pressure upon him to leave."

Petitioner summoned to Stibnite Mr. Vern Harris and Dr. Thurston of the hospital advisory board, flying them in by its airplane. These officials told petitioner that they had no jurisdiction in such matters (R 511, 1528, 1533, 1534, 1614), but nevertheless they, at the insistance of petitioner, went to the hospital to interview Dr. Boice. It was during this conversation that Mr. Harold Bailey, petitioner's mine superintendent, in the presence of others, accused Dr. Boice as follows: "You committed an illegal abortion yesterday and I have seen the evidence and you better get out of town if you know what is good for you." (R 146, 147, 450, 518). Later in the conversation Mr. Bailey stated of respondent, "you are insane now and you were before you came to Stibnite, and Miss Morton thinks so too." (R 152, 241, 242). Likewise Bailey told respondent that if he didn't get out of town immediately they would tie him up and fly him out in an airplane (R 149).

The following morning, May 15, 1948, John Bradley, petitioner's vice-president in charge of Idaho operations, arrived in Stibnite and ordered petitioner out of town by sunset. When respondent asked what would happen to his possessions Bradley stated: "I don't give a damn, I am not responsible for that. This is a furnished apartment; put everything you can in a suitcase and get out." Bradley then ordered Jerry Logue, an armed guard of petitioner, to search respondent's apartment. As he left respondent's apartment, Bradley ordered respondent to remain in the apartment, and immediately thereafter armed guards were posted around the apartment where they remained from noon

that day until about seven o'clock that evening (R 153-157, 244-248, 1536-1538).

These armed guards, on the instruction of petitioner, imprisoned respondent in his apartment the remainder of that day (R 157-159, 165, 167, 172, 177, 193, 208, 241, 245, 252, 253, 260, 360, 1233, 1247, 1297, 1442, 1478, 1496, 2093, 2110, 2125).

That same afternoon Ben Mahoney, petitioner's personnel manager, called Mr. Frank Bussy, Mrs. Boice's father, in Texas, and stated to him "That Dr. Boice was a mental case" (R 340).

Petitioner's officials called Mr. Mossman, sheriff of Valley County, and Mr. C. Ben Martin, the county prosecuting attorney, long distance and, in spite of being told that it was not a matter for them in their official capacity, summoned them to Stibnite, transporting them in petitioner's plane (R 1305). Mr. Martin threatened to put Dr. Boice in the state insane asylum if Mrs. Boice did not cooperate with him to obtain a voluntary commitment of respondent, and further threatened to throw both Dr. and Mrs. Boice in jail (R 257, 258).

At the termination of the conversation Mr. Martin told respondent that he would not arrest him if he promised to leave Stibnite with his family the following day to which respondent finally agreed (R 159-161, 262-267). The next morning, Sunday, May 16, 1948, Mrs. Boice asked Mr. Bradley if they could have one additional day because all three of their children were sick. This request Bradley refused, saying that they

would get out of town if they knew what was good for them (R 267-269).

Petitioner had previously cut respondent's telephone lines (R 175, 323, 1325, 1489, 1548, 1646, 1739) and had in addition given instructions that the Boices could not receive or make any telephone calls (R 250 310, 311); thus effectively preventing any contact by respondent with the outside world and enclosing him within the confines of a hostile mining town.

On this Sunday petitioner flew Dr. Charles R. Lowe, a purported psychiatrist and Oscar W. Worthwine, its attorney, into Stibnite (R 1545). Dr. Lowe attempted to coerce Mrs. Boice into assisting in committing respondent to an insane asylum, and, upon her refusal, Mr. Bradley stated concerning respondent "He is bound to be crazy; go and get him" (R 270, 273).

Respondent finished packing their goods and started out of Stibnite about 10:30 on the night of May 16, 1948 with their three children, who, as well as Mrs. Boice, were ill (R 169). The roads were almost impassable and respondent was one of the worst drivers in Stibnite, as the petitioner knew (R 170, 173, 276, 1470, 1739). As they left Stibnite under the cumulative threats of petitioner, they were followed for several miles by petitioner's armed guards (R 171, 172, 277, 278, 362, 1426, 2125).

Respondent got stuck in a mud hole where they remained for about two hours until finally pulled out (R 173, 279). They then continued to a ranch where they remained for about a week until the roads opened sufficiently to continue on to civilization. Respondent

went out alone from the ranch because of the dangerous roads and it was not until about ten days later that he could return for his family (R 174, 270).

In May, 1948, after Respondent had left Stibnite Mr. Mahoney made the slanderous statement that "Dr. Boice was mentally incompetent and that he had to be held under guard so as not to harm the hospital patients and kept from shooting up the town" (R 346, 347).

Petitioner's whole course of conduct toward respondent is characterized by the amazingly arrogant statement of Mr. John Bradley, when he replied in answer to respondent's inquiry as to Bradley's authority to run him out of town, "I am the law" (R 154, 246). This assumption of dictatorial authority by Bradley was confirmed by C. Ben Martin, the Valley County prosecuting attorney. When respondent appealed to this county official for assistance, Martin informed him that Bradley certainly was the law in Valley County (R 159).

It is interesting to note that in making its statement of the facts in its petition for a writ of certiorari, the petitioner instead of referring to the record quotes at great length from the dissenting opinion of Judge Pope. Not only is this recitation merely Judge Pope's view of the facts, but it is also apparent that the judge's statement of the facts is lifted largely from petitioner's factual conception of the case as stated in its brief before the Court of Appeals. Thus it is natural that most of the record proving the respondent's case, the veracity of which has been established by the verdict of the jury, has been overlooked, and an obvious effort

made to emphasize only such testimony as is favorable to petitioner. For instance, both petitioner and Judge Pope stress the statement of Jeanne Morton that there was another woman (Mrs. Denney) in the Stibnite hospital awaiting an operation similar to that performed upon Mrs. Wood. Both conveniently overlook the subsequent admission of Miss Morton that no operation on Mrs. Denney was scheduled or contemplated and that she was in the hospital merely for observation (R 1102).

Again, petitioner and Judge Pope emphasize that the fetus removed from Mrs. Wood was "secreted" by respondent. No mention is made by them that an opportunity was given Dr. Thurston at the hospital to examine the fetus and that he refused (R 1624).

ARGUMENT

A. *Clarification of Issues*

As has been heretofore pointed out, there are only two questions presented by petitioner in its petition for writ of certiorari, i.e., the correctness of the determination by the trial court that the verdict was not motivated by passion or prejudice, and whether or not the trial court properly understood his functions in denying the motion for a new trial. The Court of Appeals for the Ninth Circuit not only affirmed the judgment in its initial opinion, but likewise denied the petition for rehearing en banc. Therefore, under 28 U.S.C.A. Section 46 at least a majority of all the judges

of the Ninth Circuit have determined that the judgment of the trial court was not in error. That these issues may be clarified and clearly understood, it is felt advisable to point out to this court that no contention is made by petitioner that the verdict of $60,000.00 is, in and of itself, excessive; nor is it urged that the evidence is insufficient to support the verdict; likewise petitioner does not assert that there was any abuse of discretion by the trial court in denying the motion for a new trial.

B. *There Are No Reasons for Granting the Writ*

It is the position of respondent that the petitioner has not, in its petition, raised any questions involving considerations of general public concern, or in which any vital public interest appears. The principal contention of petitioner seems to be that respondent's counsel through a planned and consistent appeal to the passion and prejudice of the jury, overstepped the bounds of proper cross-examination. It is submitted that a determination of this question would involve this court in a critical appraisal and evaluation of a record involving 2,227 pages, reporting a trial of almost six weeks in duration. Of necessity, this record would have to be scrutinized, together with all the favorable inferences that could be drawn therefrom in favor of the respondent. It would appear that petitioner, instead of presenting a showing of matters which are inflicted with the public interest, has merely demonstrated that this case is of importance only to the litigants involved. In desperation, petitioner asks

this court for one more forum in which to gain an additional hearing on the merits of the case.

It is counsel's understanding that this court will not issue its writ, merely to review facts, weigh evidence, or determine the inferences to be drawn therefrom.

We respectfully suggest that every conceivable question, including those raised herein by petitioner, have been raised by it on three separate occasions, and on each occasion, after a full, fair and complete hearing the questions have been resolved adversely to the petitioner and in favor of the respondent.

Initially, after the verdict of the jury, the trial judge denied petitioner's motion for a new trial on August 12, 1950, the motion having been filed on October 7, 1949. Prior to its ruling on the motion for a new trial the trial judge had before him the complete transcript of the testimony in the case, and extensive briefs of both sides. His was a considered opinion.

Again the Circuit Court, after full briefing and argument denied the appeal of the petitioner, and the petition for rehearing en banc was also denied. Petitioner throughout these separate procedures, maintained that an excessive verdict resulted from the passion and prejudice inspired in the jury by the tactics on cross-examination of respondent's counsel. In each instance the trial judge and the Circuit Court made a specific finding that the verdict was not induced by passion and prejudice, the trial judge finding:

> "The court is convinced that the jury was not actuated by passion, prejudice or partiality but that the jury acted in good faith and that the verdict was the result of the cool and dispassionate discretion of the jury." (R 124).

In its request for a writ petitioner has not met the test laid down in *General Talking Pictures v. The Western Electric Co.*, 304 U.S. 175, at page 178:

> "There is nothing in the lower court's decision or either of the added questions to warrant recovery here. * * * Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. (Cits.) Moreover the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support (Cits.) There is evidence to support them. Nor would the writ be granted to review questions of anticipation and invention that petitioner argues."

The reasons for granting the writ presented by petitioner obviously fall short of the requirements set out by Justice Frankfurter's concurring opinion in *Wilkerson v. McCarthy*, 336 U.S. 53 at page 66:

> "Considering the volume and complexity of cases, which obviously call for a decision by this court, and considering the time and thought that the proper disposition of such cases demands, I

> do not think we should take cases merely to review facts already canvassed by two and sometimes three courts even though those facts may have been erroneously appraised. The division in this court would seem to demonstrate beyond peradventure that nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances."

This court has determined that it will not review conflicting evidence, or reverse a Court of Appeals, merely because "were we in its place we would find the record tilting one way rather than the other, though fair minded judges could find it tilting either way." *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498.

See also *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508; *Layne v. Western Well Works*, 261 U.S. 387; *Forsyth v. Hammond*, 166 U.S. 506.

The Court's attention is invited to the following cases in which certiorari was denied, the question there being raised of the misconduct of counsel in argument before the jury in each instance: *Fidelity Phoenix Fire Insurance Co. v. Vallone*, 74 F. (2d) 137 (Circ. 5), certiorari denied, 294 U.S. 727; *Silkworth v. U.S.* 10 F. (2d) 711, (Circ. 2), certiorari denied, 271 U.S. 664; *Parmagini v. U.S.* 42 F. (2d) 721, (Circ. 9) certiorari denied, 283 U.S. 818.

C. *The Verdict Was Not Motivated By Passion or Prejudice*

Restating the basic question raised by petitioner, it is maintained that counsel for respondent have "with impunity," indulged in a planned and consistent appeal to the passion and prejudice of the jury, which appeal resulted in a grossly excessive verdict. An analysis of this question discloses first, that petitioner's counsel have ingeniously assumed that counsel for respondent indulged in "a planned and consistent scheme of appeal to passion and prejudice." The record does not bear out this assumption. Secondly, for the purpose of their petition here presented, counsel have indulged in another gratuitous assumption—that the verdict of the jury was grossly excessive. Both the trial court and the Circuit Court have determined these questions after complete review of the record and have found that the verdict was not excessive nor was it the result of passion or prejudice.

The assumptions and intimations of counsel for petitioner cannot be taken by this court in lieu of facts which do not appear in, nor are borne out by the record. *Hussman v. Durham*, 165 U.S. 144.

By indirection, petitioner has raised the question that the verdict in this case was excessive. The consideration of whether or not a verdict was excessive, where the question was properly raised before and determined by the trial court on motion for new trial, should not be re-examined by this Court. See *Southern Railway Co. v. Bennet*, 233 U.S. 80; *Herencia v. Guzman*, 219 U.S. 44; *St. Louis I.N. & S.R. Co. v. Craft*,

237 U.S. 648; *Louisville & N.R. Co. v. Holloway*, 246 U.S. 525; *Chicago & N.W. Ry. Co. v. Kelly*, 74 F. (2d) 31 (Circ. 8); *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474; *Wilson v. Everett*, 139 U.S. 616.

The case of *New York Central R. Co. v. Johnson*, 279 U.S. 310, cited by petitioner, is no authority for granting the writ in the case at bar. In the first place the facts are totally and completely at variance. In the second place, each case must be examined in the light of its own facts. Likewise *Minn. etc. R.R. Co. v. Moquin*, 283 U.S. 520, relied on by petitioner is not in point. There this court held that where the Supreme Court of Minn. determined that a verdict for plaintiff under the Federal Employers Liability Act was excessive because of passion and prejudice a new trial must be granted and merely remitting a portion of the verdict was error.

No hard or fast rule is laid down applicable to all cases. In this regard, this court in *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, in speaking of the closing remarks of counsel, complained of by the petitioner therein, stated:

> "They were, we think, undignified and intemperate. They do not comport with the standards of propriety to be expected of the prosecutor. But it is quite another thing to say that these statements constituted prejudicial error. In the first place, it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during the long trial that they

would not appraise the evidence objectively and dispassionately." * * *

"Of course, appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial. But each case necessarily turns on its own facts. And where, as here, the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice."

Petitioner contends that the jury was influenced by passion and prejudice in rendering its verdict, but it does not maintain that the amount of the verdict, in and of itself, is excessive. It is felt desirable to point out to this court that the verdict was clearly justified by the evidence, and consequently could only be the result of a cool, fair and impartial determination by the jury, as was found by the trial court.

There are two causes of action, both of which were resolved by the jury in favor of respondent. The first was for five separate slanderous statements made by petitioner's officials, in which a young doctor, with an excellent Army record, was publicly accused not only of committing an illegal abortion but also of being insane. The second cause of action was for two separate false imprisonments of respondent by petitioner; the first when petitioner's armed guards confined him in his apartment for many hours on May 15, 1948; the

second occurred when he and his family were hounded and driven out of the town of Stibnite by the threats and persecution of petitioner, on which journey they were accompanied by petitioner's armed guards.

See Griffin v. Clark, 55 Ida. 364, 42 Pac. (2d) 297 (1935)

It cannot be questioned but that a young physician, of good character and reputation, on the threshold of his professional life, would be seriously and materially damaged by the malicious slanders uttered against him, and by his false imprisonment by petitioner. Thus, a substantial award of general damages by the jury was clearly their duty and obligation in the administration of justice.

Also, punitive damages were prayed for in the complaint on both causes of action, and it is readily apparent from the record that the evil, wanton and malicious acts of petitioner in its serious violation of respondent's rights required an award of exemplary damages. Some of the acts of petitioner should be indicated which establish malice in fact.

1. The general circumstances surrounding petitioner's activities on the weekend in question are pertinent to disclose the malicious intent of petitioner to inflict injury on respondent.

Liquid Veneer Corp. v. Smuckler, 90 F. (2d) 196, (Circ. 9).

33 Am. Jur., Libel and Slander, Sec. 267.

53 CJS, Libel and Slander, Sec. 213.

Thus, the planned and deliberate course of action on the part of petitioner to force respondent and his family out of town by threats of imprisonment of both Doctor and Mrs. Boice, and the threats to confine Dr. Boice in an insane asylum, forms a basic pattern of petitioner's activities. State and county officials were flown to Stibnite in petitioner's airplane, none of whom had any authority or jurisdiction over respondent, to exert pressure upon him. Respondent's telephone lines were cut, and neither he nor his wife were permitted to make or receive any telephone calls. When Bradley gave respondent his final checks he forced him to sign a receipt without reading it (R 167). Although Mrs. Boice and all three of their children were ill, the Boice's were forced to drive out of Stibnite in a storm late at night over almost impassable roads, when petitioner knew that respondent was a very poor driver. Bradley vindictively refused the entreaties of Mrs. Boice to allow them one more day in which to leave.

2. Petitioner's failure to make any investigation of the outrageous and incredulous accusations of Jeanne Morton, a newcomer to the mining camp, shows that Petitioner was not acting in good faith, and had no concern for the truth of her charges. This is strong evidence that the petitioner acted maliciously.

Tribune Assn. v. Follwell, 107 F. 646, (Circ. 2).

Morning Union Co. v. Butler, 151 F. 188, (Circ. 2).

Nevada State Journal Publ. Co. v. Henderson, 294 F. 60, (Circ. 9).

Interstate Transit Lines v. Crane, 100 F. (2d) 857, (Circ. 10).

33 Am. Jur., Libel and Slander, Sec. 267.

3. The illwill, hostility and threats of petitioner must be considered by the jury, and will support a finding of malice in fact and award of punitive damages.

McCown v. Bowne, 154 F. (2d) 19, (D.C. App.).

Kroger Grocery & Baking Co. v. Yount, 66 F. (2d) 700, (Circ. 8).

33 Am. Jur., Libel and Slander, Sec. 267.

53 CJS, Libel and Slander, Sec. 213.

There are great numbers of examples of the threats and hostility of petitioner in the record:

(a) Bailey told respondent that if he did not leave town that day he would tie him up and fly him out. (R 149, 241, 284, 450, 1533, 1623).

(b) Bradley ordered respondent to leave Stibnite before sunset. (R 154).

(c) Bradley told respondent that he did not give a damn what happened to respondent's family possessions (R 155, 245).

(d) Martin, Valley County prosecuting attorney, threatened both respondent and his wife with jail (R 159, 160, 258, 262, 263, 265).

(e) To eliminate the possibility of respondent obtaining aid from the outside world, petitioner cut respondent's telephone wire and refused him and his

wife access to telephone service (R 175, 250, 310, 311, 323, 1325, 1489, 1548, 1646, 1739).

(f) Again, Martin threatened to commit respondent to an insane asylum unless he did as petitioner ordered (R 257).

(g) When Mrs. Boice appealed to Bradley for one additional day, he told her to get out of town if they knew what was good for them (R 269).

(h) Dr. Charles Lowe, an agent of petitioner, threatened to commit respondent to an insane asylum, (R 271); that this threat was motivated solely by malice is apparent, as at that time respondent was then in the process of packing preparatory to leaving.

(i) Mahoney, petitioner's personnel manager, told Mrs. Boice he would not "bury the hatchet," and that sooner or later respondent would make a misstep which would satisfy Mahoney's hostility (R 2077).

(j) Mahoney warned Mr. Bussey, respondent's father-in-law, against respondent bringing any suit against petitioner, saying that it would ruin him professionally (R 344).

(k) Armed guards confined respondent in his apartment (R 1247, 1297, 1442, 1478, 1496, 2110, 2125).

(l) Respondent and his family were trailed by armed guards when they left Stibnite (R 172, 277, 355, 362, 1426, 2125).

(m) Martin warned respondent against seeking any legal redress for petitioner's actions. (R 264).

4. The officials of petitioner denied making the slanderous statements (however, Mr. Mahoney ad-

mitted that Mr. Bradley had done so (R 450)), from which denial the jury may infer actual malice.

Louisiana Oil Co. v. Renno, 173 Miss. 609, 157 So. 705, 98 A.L.R. 1396.

5. Repetition of defamatory statements is a circumstance to be considered by a jury in the determination of malice, and will support a finding to that effect.

Fowlie v. Cruze, 52 Mont. 222, 157 Pac. 958.
33 Am. Jur., Libel and Slander, Sec. 267.
53 CJS, Libel and Slander, Sec. 214.

In addition to the five slanderous statements alleged in the complaint, there were other repetitions thereof by petitioner's officials:

(a) Bailey told Mrs. Boice in the hospital that respondent had committed an illegal abortion, and that he was insane (R 241).

(b) Bailey, Bradley or Mahoney stated that respondent either had a mental disease or was taking dope (R 2088).

(c) After respondent had left Stibnite Mahoney told Mrs. Gubser and Fay Anderson that respondent "was a nitwit doctor and a regular psychopathic" (R 2092).

(d) In the spring of 1949 Bailey made the statement in the recreational hall in Stibnite that respondent was crazy (R 2103).

(e) Speaking of the operation on Mrs. Wood, Mahoney told her husband that respondent had done a

terrible thing, and that he, Mahoney, knew it was unnecessary (R 212).

6. The defamatory statements themselves may justify an inference of the actual malice of the defamer. It is impossible to conceive of any accusations which would be so harmful and prejudicial to a young doctor than the public charges uttered by petitioner's officials that Dr. Boice was insane, and that he had committed an illegal abortion.

Washington and Annapolis Hotel Co. v. Riddle, 171 F. (2d) 732, (D.C. App.)
Massee v. Williams, 207 F. 222 (Circ. 6).
Montgomery Ward & Co. v. Watson, 55 F. (2d) 184, (Circ. 4).
National Cash Register Co. v. Salling, 173 F. 22, (Circ. 9).
Wise v. Brotherhood of Locomotive Firemen & Engineers, 252 F. 961, (Circ. 8).
Ross v. Esquire, Inc., 94 F. (2d) 75, (Circ. 2).
33 Am. Jur., Libel and Slander, Sec. 266.
53 CJS, Libel and Slander, Sec. 213 (b).

7. There is a general principal of law that the absence of good faith of a defamer is conclusive evidence of malice in fact. Bailey, who accused respondent of an illegal abortion, and said that he had seen the evidence, admitted that he had never seen the fetus (R 1624). Although accusing respondent of being insane, Bailey told the jury that he did not in fact believe that Dr. Boice was insane (R 1614, 1655). Likewise, although publicly charging respondent with insanity,

Bradley testified that he did not believe he was insane (R 1945, 1950). As these officials of petitioner stated under oath that they did not think respondent was insane, it is clear as a matter of law that they were motivated solely by malice in making the slanderous statements.

Montgomery Ward & Co. v. Nance, 165 Va. 363, 182 S.E. 264.

Massee v. Williams, Supra.

National Cash Register Co. v. Salling, Supra.

Wise v. Brotherhood of Locomotive Firemen & Engineers, Supra.

3 Am. Law Institute, Restatement of Torts, Sec. 613 (f.).

The trial court instructed the jury both on general and punitive damages in both causes of action, and further that the total damages could not exceed the sum of $150,000.00. The fact that the verdict was for substantially less than one-half of this amount is most substantial support to the determination of the trial court, approved by the Court of Appeals, that the jury was not inflamed by passion and prejudice, and that rather the jury reached its determination by a cool, deliberation and impartial appraisal of the evidence, and a conscientious application of the law as given them by the trial court.

Thus, it is clear that the verdict is supported by the record; that passion and prejudice was in no sense a motivating factor, and the award is neither excessive nor monstrous.

See Affolder v. New York, Chicago and St. Louis Railway Co. 339 U.S. 96.

The principal point urged by petitioner is that some parts of the cross examination of its witnesses by respondent's counsel were improper, and that such asserted misconduct improperly influenced the jury. One or two instances of such impropriety are mentioned by petitioner in its brief, and other claimed examples are set forth in its App. B. Petitioner claims that some questions on cross examination were asked under the guise of "impeachment," apparently meaning thereby that respondent's counsel was attempting to lay a foundation for impeachment by contradictory statements. In practically none of the instances mentioned by petitioner was such a foundation attempted to be laid; instead, the whole purpose was to test the credibility of the witnesses. Petitioner reiterates that this was a "planned course of action" to appeal to passion and prejudice. The trial court, in its careful and deliberate review of this case on the motion for new trial, found as a fact that this was not true; and this finding was approved by the Court of Appeals.

That a reasonable latitude must be given a cross examiner to insure a fair trial is well established by this court in the leading case of *Alford v. U.S.*, 282 U.S. 687, wherein the court said:

> "To find that prejudice can be established only by showing that the cross examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief is to

deny a substantial right and withdraw one of the safeguards essential to a fair trial."

People v. Denton, 78 Cal. App. (2d) 540, 178 Pac. (2d) 524.

Johnson v. Cousins, 110 Colo. 540, 135 Pac. (2d) 1021.

State v. Jones, 62 Ida. 552, 113 Pac. (2d) 1106.

Dickey v. Wagoner, 160 Kan. 216, 160 Pac. (2d) 698.

There are numerous rules, long established and adhered to by the courts, which determine the proper scope of cross examination. It would extend this brief to an unwarranted length to attempt to classify each question on cross examination which petitioner finds objectionable. However, each one of them falls under one or more of the following categories of cross examination; each one of the questions is clearly relevant, and the following rules show that each was competent and proper inquiry:

1. Cross examination is proper to show the hostility, bias or prejudice of the witness.

Furlong v. United States, 10 F. (2d) 492.

State v. Radon, 45 Wyo. 383, 19 Pac. (2d) 177.

Giraney v. Oregon Shortline Railroad Company, 54 Ida. 535, 33 Pac. (2d) 359.

United States v. Glasser, 116 F. (2d) 690 (Circ. 7).

Terminal Transport Company v. Foster, 164 F. (2d) 248 (Circ. 5).

Meeks v. United States, 163 F. (2d) 598 (Circ. 9).

United States v. Cohen, 163 F. (2d) 667 (Circ. 3).

Ingalls Shipbuilding Corp. v. Trehern, 155 F. (2d) 202 (Circ. 5).

State v. Collins, 162 Kan. 34, 174 Pac. (2d) 126.

Scott v. State, 72 Okla. Cr. 305, 115 Pac. (2d) 763.

People v. Payton, 36 Cal. App. (2d) 41, 96 Pac. (2d) 991.

Starks v. State, 67 Okla. Cr. 156, 93 Pac. (2d) 50.

Hartman v. Elias, 41 New Mex. 392, 69 Pac. (2d) 929.

People v. Ilderton, 14 Cal. App. (2) 647, 58 Pac. (2d) 986.

State v. Townsend, 146 Kan. 982, 73 Pac. (2d) 1124.

58 Am. Jur., Witnesses, Secs. 715, 718.

2. Cross examination is proper to show previous contradictory statements, or circumstances which tend to contradict the witness's evidence.

Heard v. United States, 255 F. 829.

State v. Hargraves, 62 Ida. 8, 107 Pac. (2d) 854.

Toplitz v. Hedden, 146 U.S. 252.

United States v. Felden, 136 F. (2d) 394, (Circ. 2).

Kroger Grocery & Baking Co. v. Stewart, 164 F. (2d) 841 (Circ. 8).

Atlantic Greyhound Lines v. Isabelle, 157 F. (2d) 260 (D.C.).

London Guarantee & Accident Company v. Woelfle, 83 F. (2d) 325 (Circ. 8).

Parmagini v. United States, 42 F. (2d) 721 (Circ. 9).

McIntosh v. United States, 1 F. (2d) 427 (Circ. 7).

People v. Cornett, 93 Cal. App. (2d) 744, 209 Pac. (2d) 647.

58 Am. Jur., Witnesses, Sec. 630.

3. A witness may be cross examined to place him in his proper setting.

State v. Jones, 62 Ida. 532, 113 Pac. (2) 1106.

4. A witness may be cross examined in order to modify and explain his testimony.

Malia v. Seeley, 89 Utah 262, 57 Pac. (2d) 357.

5. When a witness testifies to part of a conversation or transaction on direct examination, the whole may be inquired into on cross examination.

People v. Goldstein, 84 Cal. App. (2d) 547, 191 Pac. (2d) 102.

Home Benefit Assn. v. Sargent, 142 U.S. 691.
Crosby v. Emerson, 142 F. 713 (Circ. 3).
In re Bryan's Estate, 82 Utah 390, 25 Pac. (2d) 602.
58 Am. Jur., Witnesses, Secs. 632, 635.

6. Evidence to show the hostility of a witness is competent.

Docherty v. People, 96 Colo. 338, 44 Pac. (2d) 1013.
III Wigmore on Evidence, 3rd Ed., Sec. 948.

As has been previously argued, the record in no wise bears out petitioner's contention that respondent's counsel through planned and vicious cross examination incited the passion and prejudice of the jury. To the contrary, the cross examination is well within the proper limits set therefor. It must be kept in mind that this trial consumed a period of approximately six weeks, during which time petitioner paraded some fifty witnesses across the witness stand, a majority of whom displayed open hostility to the respondent. Examining this case in the light of its own facts it will readily appear that the verdict was not the result of passion and prejudice, nor was it excessive.

As a further argument, it is a well defined principal that an order overruling a motion for new trial on error of fact is not reviewable on appeal. This court in *Fairmount Glass Works v. Cub Fork Coal Co.*, supra, held:

"First. The rule that this court will not review the action of a Federal Trial Court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals." * * *

"Appellate courts should be slow in imputing to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." * * *

"Third. The Court of Appeals has not declared that the trial judge abused his discretion. Clearly the mere refusal to grant a new trial where nominal damages were awarded is not an abuse of discretion. This Court has frequently refrained from disturbing the trial court's approval of an award of damages which seemed excessive or inadequate, and the circuit courts of appeals have generally followed a similar polity."

See also *Luckenbach S. S. Co. v. U.S.* 272 U.S. 533; *Reagan v. Aiken*, 138 U.S. 109; *P.C. & S.L. Ry. Co. v. Heck*, 102 U.S. 58; *Shannon v. Shaffer Oil & Refining Co.*, 51 F. 2d 878 (Circ. 10).

D. *The Trial Court Did Not Misconceive His Functions.*

It is asserted by petitioner that the trial judge, in passing upon the motion for a new trial, misconceived

his functions by failing to exercise his independent judgment on the facts. The petition is completely silent as to what facts petitioner feels the trial court failed to pass upon, but, in the light of petitioner's argument, it may safely be assumed that petitioner intends to question whether the jury was influenced by passion or prejudice in rendering its verdict.

The question of passion and prejudice was raised by petitioner in its motion for a new trial, and elaborately presented in a lengthy and detailed brief filed with the trial court in support of its motion. It should be remembered that the trial court did not rule upon the motion for a new trial until all the evidence had been transcribed and was available to him in typewritten form for his study and deliberation. Therefore, it is apparent that the learned trial judge not only had the great advantage of having observed the witnesses, the jury, and the whole conduct and course of the trial, but also was able to, and did give, thoughtful and serious consideration to the questions presented in the motion for a new trial, aided by a typewritten record and exhaustive briefs, long after the heat of the trial had dissipated.

In the quiet of such an atmosphere this experienced trial judge, aided by these tools, reviewed and deliberated this case and, in the exercise of his discretion, made his ruling that the motion for a new trial should not be granted. The conscientious assumption of his duties and the complete awareness of his legal obligations are thoroughly established by the able opinion of

this judge, to which opinion respondent respectfully commends this court. (Appendix A).

In his opinion the trial court fully reviewed the evidence, keeping always in mind, as petitioner and also Judge Pope had failed to do, that the verdict of the jury resolved disputed questions of fact in favor of respondent. His opinion disclosed that he passed upon the questions of fact raised by the motion for a new trial and determined them. Speaking of the award of damages in the sum of $60,000.00 the trial judge said "There is ample evidence to support a verdict for the plaintiff."

The judge then considered the question raised in the motion for a new trial of whether or not the jury was motivated by passion or prejudice. He passed on this problem as a question of fact, and found as a fact that the verdict was not so influenced. He stated, "The Court is convinced that the jury was not actuated by passion, prejudice or partiality but that the jury acted in good faith and that the verdict was the result of the cool and dispassionate discretion of the jury." This is an exercise by the trial judge of his independent judgment on the facts and a finding by him, upon review of the whole record and his first hand knowledge of all the events of this long trial, that the jury was not influenced by passion or prejudice. *United States v. Socony-Vacuum Oil Co., supra.*

In the face of this opinion petitioner has the temerity now to urge, without particularization, that this judge misconceived his functions. The trial judge had

no misconception of his power or duty in denying the motion for a new trial. He determined the points raised as a question of fact in the exercise of his discretion, and it is readily apparent from the record that the evidence fully justified this verdict. This also was the decision of the Court of Appeals; thus there is no question raised for review by this Court. See *Fairmount Glass Works v. Cub Fork Coal Co., supra.*

Aetna Casualty and Surety Co. v. Yeatts, 122 F. (2d) 350, (Circ. 4).

Such of the cases cited by petitioner in its petition as have any conceivable bearing upon the question of a misconception by a trial court of his functions have no applicability to the case at bar For example in *Felton v. Spiro,* 78 Fed. 576 (Circ. 6), the trial court deliberately denied a motion for a new trial on the ground that he had no power to grant it, and with the express request that the court of appeals pass upon this question. Other cases involved the misunderstanding of the distinction between passing upon a motion for a directed verdict and that of a new trial. See *General American Life Insurance Company v. Central National Bank,* 136 F. 2d 821 (Circ. 6); *Reid v. Maryland Casualty Co.,* 63 F. 2d 10 (Circ. 5); or they involve the construction of a Federal Rule of Civil Procedure (*Montgomery Ward and Co. v. Duncan,* 311 U.S. 243) or of an amendment to the Constitution (*Capital Traction Co. v. Hoff,* 174 U.S. 1.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Dated April 16, 1952.

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CLARK, District Judge.

OPINION

This was an action for false imprisonment and slander. The plaintiff, Edward H. Boice, was a doctor living with his wife and children at Stibnite, Idaho, where he had resided since March, 1947, occupying an apartment provided as an incident of his employment by the defendant Bradley Mining Company. He held the position of company doctor and manager of the company hospital.

Dr. Boice was raised in Texas, and was graduated from the University of Texas Medical School in 1942, having taken his pre-medical work at Rice University, Houston, Texas. Following his graduation from medical school, he took a one-year rotating internship, covering all branches of medicine, at Jefferson Davis Hospital. Subsequently, he had offered to go into practice in Houston and offers to take further hospital residency work at Jefferson Davis Hospital and Santa Fe Hospital. He had been licensed to practice medicine in Texas. Instead of accepting any of the offers, he voluntarily entered the Army of the United States, going on active duty on July 12, 1943, at Ellington Field, Texas, with the rank of first lieutenant. From there he went to Carlyle Base in Pennsylvania for training, then to Jefferson Barracks, St. Louis, Missouri, where he served a residency in surgery in the Army. Jefferson Barracks was a basic training camp with a large hospital. After about ten months there, he was transferred to Sioux Falls Army Air Base, in South Dakota, where he was engaged in both surgery and general medicine. He remained there a year and a half. From there he went to Orlando, Florida for a couple of months, then to Truax Field, Wiscousin, for a couple of weeks; then to Harlington Air Base, Harlington, Texas. The war was over and the bases were closing down. He was separated from the service on October 19, 1946, with the rank of major.

Following his separation from the Army it was necessary for him to find a location to practice his profession. He took a trip through the Northwest with the idea of settling in this area. He made various inquiries throughout the Northwest as to openings for doctors and wrote to medical associations in

California, Oregon and Washington concerning opportunities. He returned to Texas and had about decided to settle down in Houston and practice his profession there. He had begun negotiations for buying a home there, as well as office equipment. During this time, in December, 1946, he received communications from defendant Bradley Mining Company by telephone and by letter, and was asked if he would come out and discuss the position at Stibnite. In January, 1947, he came to Boise, where he was met by an executive of the Bradley Mining Company, and they proceeded to Stibnite so that Dr. Boise could look over the facilities there and learn the details of the position. He entered into a contract with defendant Bradley Mining Company at that time to operate the defendant's hospital and practice medicine in Stibnite. He then went back to Texas for his possessions and family, and returned to Stibnite with his family on the first of March, the beginning date of his contract. Meanwhile he had obtained his license to practice medicine in Idaho.

Plaintiff testified in substance that on May 14, 1948, he was handed a letter of dismissal by executives of defendant Bradley Mining Company, that he was ordered to go to his apartment and stay there, and that the company placed armed guards around his apartment and kept them on constant watch for three days, or the better part of three days, to prevent him from leaving; also that he was ordered not to see his patients and not to enter the hospital. This was a matter of common knowledge throughout Stibnite. He testified further that certain defamatory remarks were made to and concerning him, in the presence of unprivileged persons, by executives of defendant company. Plaintiff's wife, Catherine Boice, similarly testified to the placing of armed guards around the apartment, as well as to certain defamatory remarks made concerning plaintiff. Specifically, the slanderous remarks charged were to the effect that plaintiff was crazy; that he was insane before he went to Stibnite and still was; that he was a mental case; that he was insane and had to be kept under guard to keep him from harming his patients and shooting up the town; and that he had committed an illegal abortion.

Both plaintiff and his wife testified that they were compelled, against their will and while their children were ill, to leave Stibnite late at night on the 16th of May, 1948, and to

drive their car over the impassable road toward Cascade; that they were followed out of town by the deputy sheriff's car; and that the roads were in such a condition that they were delayed for two hours and eventually got to a dude ranch down the road, where they all stayed for about a week before Dr. Boice undertook to drive on to Cascade, leaving his wife and three infant children, aged one, two and four years, at the dude ranch; and that it was some time later before Dr. Boice could return to the dude ranch and remove his family to Cascade and on in to Boise.

There was evidence that defendant company's switchboard operator was instructed by an executive of defendant company on May 15 not to take any more telephone calls for the Boices and that plaintiff's telephone was cut off in his apartment. While damages for this treatment were not prayed for, it was competent in support of the allegation of malice.

The testimony of plaintiff and his wife relative to some of the slanderous statements and relative to the armed guards stationed around plaintiff's apartment was corroborated by other competent witnesses. The defendant offered evidence that was in direct conflict with the testimony offered by the plaintiff. It denied the false imprisonment, and as to this phase of the case the defendant's evidence was to the effect that guards were placed in the hospital (adjacent to the doctor's apartment) only for the purpose of keeping the doctor out of the hospital and not for the purpose of keeping him in the apartment as alleged in the complaint.

As to the slanderous statements alleged, the defendants offered testimony in an attempt to show that no slanderous statements were made; also some testimony tending to show that if such statements were made they were within the rule of privilege; and there was also some evidence to the effect that if such statements were made and were slanderous they were true.

As to the allegation that the officers of the Bradley Mining Company had made statements to the effect that the doctor had committed an abortion or an illegal abortion, a great deal of evidence was introduced, a number of nurses from the hospital testifying to being in attendance at an operation performed on a Mrs. Wood—specifically, a hysterectomy—during the performance of which a live baby of approximately six

months was taken and placed in a sponge basin, where it kicked for some minutes. This particular testimony was denied, on rebuttal, by one nurse who was in attendance at the operation. Mrs. Wood was called, in rebuttal, and testified that she had five children, that within a short time after conception in each instance she knew that she was pregnant; also that at the time she entered the hospital for the hysterectomy she had no knowledge of any pregnancy.

A great many witnesses were called by the defendant who testified to actions on the part of the doctor to substantiate the statements that the doctor was insane.

It was the privilege and the duty of the jury to evaluate the testimony, and it is manifest from the verdict that the jury believed the testimony of the witnesses for plaintiff, or at least believed a substantial part of it. It is evident that the jury determined that the slanderous charges were not true.

The jury was instructed that plaintiff had alleged false imprisonment and five separate slanderous statements by the defendants and that it was not necessary, in order to find in favor of the plaintiff, that all of those matters be proved by a preponderance of the evidence but that it was sufficient if they should find any one or more of the allegations to have been so proven. There is much conflicting testimony. However, it was solely for the jury to determine what testimony to believe, as quoted with approval by the Supreme Court of Idaho in the case of Summerfield v. Pringle, 144 Pac. (2) 214. The Court cannot determine from the verdict, of course, the precise allegations which the jury found to be proved by the evidence.

The jury was instructed that exemplary or punitive damages could be awarded if it first found that actual damages had been sustained or suffered by plaintiff, and further instructed that exemplary or punitive damages in addition to the actual or compensatory damages could be allowed if it found that the false imprisonment, of any, was wanton, malicious or gross and outrageous, or the facts such as to imply malice and oppression. As to punitive damages in addition to compensatory damages for the alleged slander, the jury was instructed that such could be allowed if it believed from the evidence that the defendants were prompted by actual malice in making the defamatory statements, and that the law presumes or

infers that such statements were made maliciously, if made at all, because they are slanderous on their face, and that inasmuch as defendants had, during the trial, denied making the slanderous statements, such denial could be considered in determining whether or not there was actual malice on the part of defendants if it was determined from the evidence that the statements were in fact made by defendants. There can be no doubt that the jury found that the defendant Bradley Mining Company acted maliciously. The jury was instructed that plaintiff could not claim damages for acts of his own, or for the publicity given to the matter by bringing this action.

Subject to the above and other detailed instructions on the law governing damages, the only restraint placed on the jury by the Court's instructions with respect to the amount of damages that could be awarded was that the amount could in no event exceed the amounts prayed for in the two causes of action set forth in the complaint, to wit, $150,000.00.

The jury awarded the plaintiff $60,000.00 damages against the defendant Bradley Mining Company, and the case is now before the Court on the defendant's motion for a new trial, the motion being based on the ground that the jury did not follow the instructions of the Court, that the evidence did not support the verdict, and that the verdict is excessive. There were no objections made by the defendants to the instructions nor was there any motion made to reduce the amount prayed for as being excessive, prior to the submission of the case to the jury and entry of judgment on the verdict. The Court must assume that the jury followed all of the instructions of the Court. There is ample evidence to support a verdict for the plaintiff.

This leaves only for the Court the consideration of the question of excessive damages. As a broad general rule, the damages must be reasonable whether merely actual damages or actual and exemplary damages. Unless the amount is so unconscionable as to impress the Court with the injustice of the award, and thereby induce the Court to believe that the jury was actuated by passion, prejudice or partiality, there will usually be no interference with the jury's verdict. At the very threshold of this inquiry it must be remembered that the Constitution of the United States and of this State, as well as all other states, has secured the right of trial by jury

in civil actions by the words, "shall be preserved" or, as stated in the Constitution of the State of Idaho, "shall remain inviolate." If this mandate is to be obeyed the Court must proceed with caution when a motion such as is now before this Court is considered, with the thought in mind that if the Court is going to set aside the verdict for no reason except that the Court feels it is excessive, this constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the Court could supplant its opinion in place of the opinion of the jury.

The Court is convinced that the jury was not actuated by passion, prejudice or partiality but that the jury acted in good faith and that the verdict was the result of cool and dispassionate discretion of the jury. The question of excessiveness is primarily addressed to the discretion of the trial court with the constitutional provision above referred to in mind, each case being considered on its own facts. While the amount awarded as exemplary damages is not dependent on the amount of the general or actual damages, still it must be reasonable.

There is no scale nor definite standard by which the damages from slander can be ascertained, but the amount must be governed by the circumstances of each particular case and the allowance made by the jury will not be set aside by the courts unless it clearly appears to have been arrived at through passion or prejudice. The law does not prescribe a definite rule for the ascertainment of the exact amount of damages recoverable for false imprisonment, such question being primarily one for the determination of the jury. In fixing the amount of the award, the jury is justified in exercising a liberal discretion, taking into consideration all the items for which damages may properly be awarded.

Beyond the broad general rule just mentioned, there are special considerations singularly applicable to the case at bar. According to the great weight of authority, defendant's pecuniary ability may be considered in fixing the amount of punitive or exemplary damages. There was ample evidence in this case from which the jury could have inferred, and must almost certainly have inferred, that the defendant Bradley Mining Company was a wealthy company. There is also authority that the status of plaintiff may be considered in fixing the amount of the award. In this case, plaintiff was a young professional

man who was endeavoring to get a start. He had not established an enviable reputation in his profession for he had been practicing only a short time. The jury doubtless took into consideration the fact that the abuses were more likely to injure him than if he had been practicing his profession for many years and had already established a good reputation and following as a physician. Behrendt v. Times-Mirror Company (Calif.), 85 Pac (2) 949.

There is still another consideration which is obvious as it is important, and that is that radical changes have taken place in recent years affecting potential earnings and the cost of living. Verdicts might logically be approved today which would have been unhesitatingly set aside as excessive not so long ago.

Juries have a wider discretion in the matter of punitive damages for slander and false imprisonment than in the matter of compensatory damages, and the Court should not substitute its judgment for the judgment of the jury, even though the Court may be entirely dissatisfied with the jury's verdict. The power of the Court in this respect is limited to granting another trial or, which is to the same effect, giving the plaintiff an option to accept a lesser sum than the verdict awards or submits to a new trial. There must be a very careful limitation to the exercise of this power by the Court, lest it result in the exhaustion of the parties. The trial of this case occupied approximately six weeks. Another trial would likely be a heavy burden to place upon the parties litigant and there is no assurance that a new jury would return a different verdict.

It is the opinion of the Court that the jury in this case was very stable, capable, attentive and conscientious. The jury in this case served for a considerable time in this court and the Court was impressed by the quality and fairness of the jury in all cases where different members of this jury served. This being true, the Court is reluctant to interfere with the jury's determination and it is questionable whether Court would be justified in doing so. The verdict is for a large sum, a large portion of which must necessarily be for exemplary damages. It would have been preferable for the Court to have submitted two forms of verdict, one for general damages and one for exemplary damages, so that the Court could be advised in regard to the finding of the jury in arriving at the verdict. The jury was advised as to the limit it could go in assessing

damages against the defendant. For the Court to say to a jury, this you can do, and then when the jury has acted say that it acted wrongly, discredits the Court if the Court on that ground sets aside the verdict.

Counsel for the defendant have moved to set aside this verdict which the Court now has before it and have asked that a new trial be granted. This verdict was the best judgment of twelve jurors, with the judge during the course of the trial directing them as to matters of law emerging from the evidence. "The jury assisting the judge in determining the matter of fact and the judge assisting the jury in determining points of law, a jury trial has the advantage of the judge's observation, attention and assistance in points of law by way of decision and in points of fact by way of direction of the jury." 2 Hale Hist. Com. Law (5th Ed.) 147, 156, cited Capital Traction Company v. Hof, 174 U.S. 1, 14.

The defendants plead and endeavored to prove a double-barreled defense—first, that they had not made the slanderous statements charged, and second, that the statements made as to the doctor's committing an illegal abortion and that he was insane were true. In support of this second defense, the defendants spent several weeks with a large number of expert medical witnesses. The jury no doubt found that the defendant had made the statements and also determined that the statements were not true. The Court instructed the jury, as hereinbefore stated, that inasmuch as defendants had during the trial denied making the slanderous statements, such denial could be considered by the jury in determining whether or not there was actual malice on the part of the defendants if it was determined that the statements were in fact made by the defendants.

The Court is not unmindful that this is a large verdict. However, it must be remembered that no doubt the jury considered the fact that Dr. Boice has, on account of the acts of the defendant, had a poor start in the practice of his profession and has suffered abuses at its hands, and that the amount of damages allowed was the jury's best judgment. This being true, the Court is of the opinion that it would not be justified in interfering with the jury's determination, and an order is filed in harmony with this opinion.

[Endorsed]: Filed August 12, 1950.

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In the Supreme Court of the United States

OCTOBER TERM 1951

No. 648

BRADLEY MINING CO., A Corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

Reply Brief of Petitioner

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

In its petition, Petitioner has set out four questions that are presented. Respondent states that there are only two questions—by doing so, Respondent avoids the crucial question, i.e., whether a verdict rendered in a United States Court, when induced by passion and prejudice, shall stand.

Respondent's brief contains no discussion of the failure of the majority of the panel of the Circuit Court to make a direct finding that passion and prejudice did not enter into the rendering of the verdict by the jury.

DEPARTURE BY MAJORITY OPINION—NECESSITY OF SUPERVISORY REVIEW

Circuit Judge Pope's specific findings of the existence of appeals to passion and prejudice resulting in a grossly excessive verdict are contained in our original petition. His

detailed documentation of such inflammatory appeals is supplemented by record references in Appendix B of our petition. His findings, in brief, as to the record of inflammatory appeals are—

> "• • • they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise to passion and prejudice on the part of the jury. • • • The important fact is that this highly prejudicial matter was improperly before a jury which has produced a very large verdict. It serves to account for the size of the verdict. • • • A jury cannot be expected to make a calm, judicious and fair appraisal of damages in such an atmosphere. It is apparent that this one did not." (R. 2219-2224)

The majority of the panel in its opinion does not dispute the fact that the findings made by Judge Pope in his dissent correctly state the record. We repeat the pertinent excerpt from the majority panel opinion which actually confirms Judge Pope's findings of the existence of appeals to passion and prejudice. The majority said—

> "The complaint is that the impeaching questions were not attempted to be followed up by evidence that the witness had in fact made the statement. One need not approve tactics of this sort in order to reject appellant's argument. We think that jurors are not so easily misled. They may safely be assumed to have intelligence enough to know that if a party has evidence tending to impeach an adverse witness he will produce it.[1] In sum, the instances of claimed miscon-

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[1]The short answer to this observation is that no such impeachment evidence was introduced—the "impeachment" was constantly insinuated by counsel—without any substantiation whatsoever. See Judge Pope's Note 7.

duct cited are not thought to have had a *substantial* tendency to inflame the jury." (Emphasis ours.)

The real question, therefore, is—can a verdict be permitted to stand which is found to be in *any* degree the result of appeals to passion and prejudice?

The question presented here is not one, as contended by Respondent, that affects merely the litigants in this case—it goes to the very heart of judicial administration. The majority opinion has laid down the test for determining whether or not a verdict is vitiated and a litigant deprived of a fair trial where a consistent and cumulative course of inflammatory conduct is involved that could not possibly be cured by any instruction of the trial court—that test is whether or not such appeals to passion and prejudice have a *substantial* tendency to inflame a jury.

It is submitted that this departure by the court below from the accepted and usual course of judicial proceedings is clearly a matter of public importance calling for a review by this court in the exercise of its power of supervision under Rule 38, 5(b).

The above test is directly in conflict with the test laid down by this court in the case of *Minneapolis, St. Paul, etc. v. Moquin* (1931), 283 U.S. 520, 75 L.Ed. 1243, 1244—in which this court said:

> "In actions under the Federal statute (Employers Liability)[2] no verdict can be permitted to stand which is found to be *in any degree* the result of appeals to passion and prejudice. Obviously such means may be

[2]The court pointed out that the determination was under a Federal statute because the case came up from a *state* court. There is no necessity of showing a Federal question was involved when the question is one of administration of justice in a *Federal* court.

quite as effective to beget a wholly wrong verdict as to produce an excessive one. *A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.*" (Emphasis ours.)

The majority placed its result on a calculation and speculation which this Court has held is not to be indulged in.

Prior to the instant decision the law has been that conduct on the part of a litigant or his counsel which to *any* degree induces a verdict by appeals to passion and prejudice vitiates that verdict irrespective of whether or not it is measured or tested by the word "substantial". It clearly appears from the majority opinion that the majority *recognized* the existence of inflammatory appeals in stating "One need not approve tactics of this sort in order to reject appellant's argument." The affirmance of this case will be nothing less than an approval of such tactics. Furthermore, the majority of the panel did not make any specific finding that the verdict was not induced in *any* degree by passion and prejudice. It leaves uncontradicted the finding by Judge Pope in his dissent that it was so induced.

RECORD REFUTES "DETERMINATION BY MAJORITY OF NINTH CIRCUIT JUDGES"

At the bottom of page 9 of Respondent's brief in opposition, reference is made to the fact that the Court of Appeals for the Ninth Circuit not only affirmed the judgment in its initial opinion, but likewise denied the petition for rehearing en banc, and then Respondent states:

"Therefore, under 28 U.S.C.A. Section 46 at least a majority of all the judges of the Ninth Circuit have

determined that the judgment of the trial court was not in error."

There is no evidence in the record that the petition for rehearing en banc was ever submitted to any judges of the Ninth Circuit Court other than Judges Healy, Bone, and Pope.

On page 2226 the record is very clear that the proceedings were had only before Judges Healy, Bone and Pope, and the order entered states:

> "Upon consideration thereof, and by direction of the Court, It Is Ordered, by Circuit Judges *Healy* and *Bone,* that the petition of appellant, filed January 18, 1952, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied" (emphasis ours).

The petition for rehearing requested hearing *en banc.* As shown above, that petition was denied by the same two judges, Judges Healy and Bone, who joined in the majority opinion. Consequently—contrary to Respondent's contention—the determination by the Ninth Circuit was not by a majority of all the judges of that Circuit.

VERDICT WAS RESULT OF INFLAMMATORY APPEALS TO PASSION AND PREJUDICE

Respondent relies repeatedly on the action of the trial judge. But the trial judge misconceived his function and duty on a motion for new trial. We refer again to Judge Pope's opinion, Note 8. An analysis of the trial judge's opinion shows his clear recognition of a large verdict, his obvious omission to "weigh the evidence" as was his duty on a motion for new trial, the complete lack of reference

to and weighing of the vast amount of uncontradicted and unimpeached testimony referred to by Judge Pope in mitigation and justification, and his declared position that "a jury trial would be a useless thing if in the final outcome the court could supplant its opinion in the place of the opinion of the jury". The court's stated conception of his function would apply to his function on a motion for a directed verdict rather than to his duty on a motion for a new trial. See also his statement that "the Court should not substitute its judgment for the judgment of the jury, *even though the Court may be entirely dissatisfied with the jury's verdict.*"

At page 14 of his brief, Respondent argues that we have "ingeniously and gratuitously assumed" that the verdict was excessive and that it resulted from appeals to passion and prejudice—without support in the record for our position. We have made no such "assumptions".

Respondent does not deny and cannot deny the statement on page 8 of our petition that there was not a word of testimony which would support any finding of damage in fact. No actual damages were proved or attempted to be proved.

As to the charges of false imprisonment—despite the trial judge's erroneous finding "that the company placed armed guards around his apartment and kept them on the constant watch for three days, or the better part of three days, to prevent him from leaving", counsel for Respondent has finally been forced to admit that the alleged "imprisonment" could not have been for more than a few hours on Saturday afternoon of the week end (Respondent's brief, pages 5, 6). The record shows that this so-called imprisonment was during the time two County officials—not agents

or employees of petitioner—were in Respondent's apartment discussing the situation with Respondent. We submit that Judge Pope has accurately stated that "the evidence of imprisonment was exceedingly flimsy".

As to the claimed charges of slander, Respondent attempts to rivet attention on various alleged occurrences on the May week end by pulling a curtain down on the many months of background and setting of the whole case which was shown by an overwhelming amount of uncontradicted and unimpeached testimony—fully documented by Judge Pope. After a long course of conduct by Respondent in the company hospital—ranging from erratic and bizarre behavior to downright malpractice—Respondent was given a 60-day termination notice on April 30th—two weeks *before* the events of the May week end. The operation on a pregnant woman (resulting later in Respondent's admitted burial in the ground of the fetus) was not an isolated event but was the proximate cause of justifiable anxiety and action on the part of the mining company officials. The record shows Petitioner's officers honestly believed that there was "something wrong" with Respondent. In this connection, Judge Pope specifically finds "there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties".

In view of what Judge Pope has characterized as "a thin case whipped up into a monstrosity", Respondent's counsel lean heavily upon charges of malice. The charges of malice referred to in Respondent's brief were controverted by the County Attorney, by Dr. Lowe, and others to whom the statements were attributed. We realize we must assume for the present purpose a permissible inference of malice, but

we submit that when the events of the week end are put into their proper focus, that the inference of *lack of malice* on the part of the officials responsible for the community—is the "stronger" inference, as stated by Judge Pope.

The overwhelming uncontradicted and unimpeached testimony in mitigation and justification has, as Judge Pope indicates, been overlooked.

Petitioner submits that the excessive verdict against the petitioner corporation (with the exoneration of the principal actor for the corporation—John D. Bradley) was directly due to the consistent inflammatory appeals to passion and prejudice. These appeals have not been "assumed" by Petitioner but are grounded on the record as set forth in the petition and in Appendix B thereto. We purposely quoted at length from Judge Pope's dissent in which these appeals are documented because we preferred to present the matter in the form of a judicial finding of a member of the court, rather than to be left open to a charge of biased advocacy on our part.

To avoid dealing with the crucial issue here, Respondent has obviously attempted to argue that the petition presents merely a case of a verdict based on conflicting testimony. The question of whether appeals to passion and prejudice have affected a jury verdict can arise *only* in situations where some conflict has occurred—otherwise a verdict would be directed as a matter of law. Questions as to passion and prejudice occur when inflammatory appeals *have poisoned the resolution of a claimed conflict in testimony* by the jury as in the instant case.

Respondent's citations do not sustain the decision below involving a finding by the dissent that the inflammatory

appeals affected the verdict and a recognition of such appeals by the majority.

We note, on page 10 of Respondent's brief, counsel's warning to this court as to the size of the record. So far as we know, this court—in its interest in the proper administration of justice in Federal courts—has not dodged a question which merited consideration because of the size of a record. We are not asking for "an additional hearing on the merits" as Respondent contends. The record as to the inflammatory appeals to passion and prejudice is set forth in detail in our petition and appendices plainly demonstrating that Petitioner did not have a fair and impartial trial of the disputed question as to its liability.

The effect of the majority panel ruling—a license permitting with impunity such inflammatory conduct in any trial—far transcends this case. We respectfully submit that this Court should issue its writ of certiorari, as prayed.

Dated: April 22, 1952.

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In the Supreme Court of the United States

OCTOBER TERM 1951

No. 648

BRADLEY MINING CO., A Corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

Supplement to Reply Brief of Petitioner

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner submits this supplement to its reply brief because of Respondent's assertion that a majority of the judges of the Ninth Circuit had participated in the determination below. It was not possible, at the time of filing our reply, to complete an analysis of the practice of the Court of Appeals for the Ninth Circuit in acting upon petitions for rehearing en banc.

On page 9 of Respondent's brief in opposition to our petition it is stated:

"The Court of Appeals for the Ninth Circuit not only affirmed the judgment in its initial opinion, but likewise denied the petition for rehearing en banc. Therefore under 28 U.S.C.A. Section 46 *at least a majority* of all of the

judges of the Ninth Circuit have determined that the judgment of the trial Court was not in error."

Respondent's misrepresentation on this point—based on this record—is pointed out in Petitioner's reply brief, pages 4 and 5. The record shows that only two judges, not a majority of seven, denied the petition for rehearing en banc—the same two judges, Judges Healy and Bone, who joined in the majority opinion. As a matter of fact the petition for rehearing en banc was not even presented to the full court (R. 2226).

The petition for rehearing in the Court below was entitled "Appellant's Petition for a Rehearing En Banc." The petition was addressed: "To: The Honorable, the Chief Judge, and to the Honorable, the Circuit Judges of the United States Court of Appeals for the Ninth Circuit." The petition expressly sets forth "grounds for rehearing en banc" and requested, throughout, action by the full court of 7 judges.

For convenience we again set forth the order which occurred at page 2226 of the record:

> "Upon consideration thereof, and by direction of the Court, It Is Ordered, by Circuit Judges *Healy* and *Bone,* that the petition of appellant, filed January 18, 1952, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied" (emphasis ours).

PRACTICE OF NINTH CIRCUIT AS TO ACTION ON PETITIONS FOR REHEARING EN BANC CONTRAVENES INTENT OF CONGRESS.

The practice of the Ninth Circuit is *not* to present petitions for a rehearing en banc to all seven judges for

determination. They are presented *only* to the minority *panel* of three judges who have acted on the case. Thus 3 out of 7 judges—and in numerous cases 2 out of 7 judges, as in the instant case, have denied petitions addressed to the full Ninth Circuit court.

We submit this practice—and the minority denial in this case—flies in the face of the intent of Congress enacted in 1948 in Title 28 U.S.C. Section 46(c), which provides:

> "(c) Cases in controversies shall be heard and determined by a Court or division of not more than three judges, *unless a hearing or rehearing before the Court en banc is ordered by a majority of the Circuit Judges of the Circuit who are in active service.* A Court en banc shall consist of all active circuit judges of the Circuit."

In denying the petition below for a rehearing en banc, 2 judges by their action—pursuant to Ninth Circuit Court practice of *not* presenting such petition to all 7 judges in the Circuit—short circuited any consideration of the petition by the majority of the Ninth Circuit judges.

How can the clear Congressional intent expressed in the above Judicial Code section possibly be carried out if a petition for rehearing en banc addressed to the full complement of 7 judges of a Circuit is by this Circuit's practice not even presented to all 7 judges for majority action—but is distributed and submitted for determination *only* to a *minority* panel of the three judges who acted on the appeal? Such practice and determination is directly in conflict with the above Judicial Code section and decisions of this Court. The Code section specifically provides for an order "for a hearing or rehearing en banc by a *majority* of the Circuit

judges of the circuit"—*not* by a majority of a *panel* or *division* of a Circuit. Obviously this practice of the Ninth Circuit—as demonstrated in the instant case—amounts to a nullification of Section 46(c).

HISTORY OF SECTION 46(c)—NINTH CIRCUIT PRACTICE

Title 28 U.S.C. Sec. 46(c) resulted from a conflict between the Ninth Circuit and the Third Circuit. In *Lang's Estate v. Commissioner*, 97 F.(2d) 867 (1938), the Ninth Circuit held that there was no basis in law for hearings or rehearings en banc. A contrary holding by the Third Circuit appeared in *Commissioner v. Textile Mills Corporation*, 117 F.2d 62 (1940). On Certiorari in the *Textile Mills* case, this Court upheld the Third Circuit. A bill (S. 1053)—introduced in the 77th Congress in an effort to amend Section 212 of old Title 28 U.S.C. to clarify the statute in accordance with this Court's holding—was not then enacted but was adopted in substance as Section 46(c) when the Judicial Code was revised in 1948.

According to the reviser's note this Section 46(c) "preserves the interpretation established by the Textile Mills case"—*Textile Mills v. Commissioner*, 314 U.S. 326, 333, 86 L.Ed. 249 (1941). Justice Douglas in delivering the opinion of this Court in the *Textile Mills* case in support of a Circuit Court decision rendered en banc refers to the history of old Title 28 U.S.C. and stated:

> "Certainly the result reached makes for more effective judicial administration. *Conflicts within a circuit will be avoided, finality of decision in the circuit courts of appeals will be promoted.* Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of

last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting en banc. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation."

In *U. S. ex rel. Robinson v. Johnston,* 316 U. S. 649, 86 L.Ed. 1732 (1941) this Court granted certiorari to the Court of Appeals for the Ninth Circuit—citing the *Textile Mills* case—and at the same time vacated the Ninth Circuit Court's judgment and remanded the case "for further proceedings, *including leave to petitioner to apply for a hearing before the Court en banc,*" stating:

"In view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case (see Robinson v. Johnston (C.C.A. 9th), 118 F.(2d) 998, 1001, and Crockett v. United States (C.C.A. 9th), 125 F.(2d) 547-549) and in view of this Court's decision in Waley v. Johnston, 316 U.S. 101, ante, 1302, 62 S.Ct. 964, reversing (C.C.A. 9th), 124 F.(2d) 587, the judgment is vacated, and the case is remanded to the Circuit Court of Appeals for further proceedings, including leave to petitioner to apply for a hearing before the court en banc. See Textile Mills Corp. v. Commissioner of Internal Revenue, 314 U.S. 326, ante 249, 62 S.Ct. 272."

Subsequent to the above decision of this Court in the Johnston case, the Ninth Circuit on its own motion ordered a hearing en banc and reversed its earlier decision—see *Robinson v. Johnston,* 130 F.2d 202 (1942).

Approximately seven years later a petition for a rehearing en banc was denied by 2 judges of the Ninth Circuit (out of a panel of 3) in the case of *Independence Lead Mines Co. v. Kingsbury,* 175 F.2d 983 (1949). Chief Judge C. Denman, dissenting, stated (page 992):

> "The attempt of two judges in a panel of three judges to deny a petition for rehearing en banc violates the law as established in United States ex rel. Robinson v. Johnston, 316 U.S. 649, 650, 62 S.Ct. 1301, 86 L. Ed. 1732, and Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326, 333 et seq., 62 S.Ct. 272, 86 L. Ed. 249.
>
> The order of August 22, 1949, of this panel of this court does not truthfully describe its action. What it attempts to do is to deny a petition to the Court en banc for a rehearing by our whole court of seven judges. * * *
>
> *In view of the Supreme Court decisions cited above, it is too obvious to need argument that two judges cannot thus assume to act on a petition addressed to seven judges."* (Emphasis ours.)

This is exactly what happened in the instant case. Furthermore our petition addressed to all 7 judges and requesting specifically a rehearing en banc—based, among other things, upon the vigorous dissent of Judge Pope *was not presented* to the 7 judges but *only to* the 3 judges of the panel, Judges Healy, Bone and Pope (R. 2226). The order at page 2226 of the record, quoted above, shows that only Judges Healy and Bone acted in denying the petition for rehearing en banc below. It will be noted also, in line with Judge Denman's dissent in the *Independence Lead Mines* case that the order (R. 2226) by "the Court" referred to

above "does not truly describe its action." The order below is an "order denying petition for rehearing." No mention whatever is made of the fact that the petition—expressly addressed to all 7 judges—was a petition for *rehearing en banc.* The order also states that it is made "upon consideration thereof, *and by direction of the Court*"—despite the fact that the petition was presented only to 3 judges out of 7 and denied by 2 judges (R. 2226).

The practice in the Ninth Circuit of two judges denying a petition addressed to the full Court seems not to have been repeated after the Independence Lead Mines case until the denial of the petition for rehearing en banc by Judges Healy and Bone in this case. Instead in *Kronberg v. Hale,* 181 F.(2d) 767 (Feb. 1950) the Ninth Circuit (per curiam, before Judges Healy, Orr and McAllister) inaugurated the procedure of *striking* a petition for a rehearing en banc "as being without authority in law or in the rule or practice of the court."

In May, 1950 an identical order striking the petition was made in two cases, on the authority of the Kronberg case, by a panel consisting of Circuit Judge Bone and District Judges Goodman and Mathes—see *Freuhauf Trailer Co. v. Myers,* 181 F.2d 1008, and *Northwestern Mutual Life Insurance Company of Milwaukee v. Gilbert,* 182 F.2d 256.

On January 23, 1952, our petition for rehearing en banc addressed to the Chief Judge and all the Circuit Judges of the Court below was not "stricken" as in the *Kronberg, Freuhauf* and *Gilbert* cases—but was "denied" by two judges of the Ninth Circuit panel without any reference to the fact that the petition specifically requested a hearing en banc by the full court. Under the Ninth Circuit practice,

as we have pointed out, the petition for rehearing en banc was not even presented to the full court for consideration.

Seven days later on January 30, 1952, in *Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al.* (Circ. 9—No. 12,506) the prior procedure of striking a petition for rehearing en banc was resumed —the petition being stricken on the authority of the *Kronberg* case by Circuit Judge Healy and District Judge Byrne—District Judge Fee dissenting. There is now pending in the Court of Appeals for the Ninth Circuit a petition in the *Western Pacific* case "for leave to file a motion to vacate order striking appellant's petition for rehearing en banc and reinstating such petition."

It is significant that there is no provision in the rules of the Court of Appeals of the Ninth Circuit for a rehearing en banc. In this connection see the Final Report of the Committee on Codification and Revision of the Judicial Code, transmitted on August 16, 1948 to the Courts of Appeals by the Director of the Administrative Office of the United States Courts, which sets out the contents of Section 46(c) and states:

> "The new provisions will call for changes in the rules of each of the Circuit Courts of Appeal."

It is apparent, however, that the rules of the Ninth Circuit were not changed as a consequence of the new Judicial Code, except as to the name of the Court and the title of the Chief Judge. The history of Ninth Circuit determinations in connection with petitions for rehearings en banc shows the adopted practice of not presenting such petitions to the attention of the full court—at times even over the protest of the Chief Judge. It is clear therefore that a liti-

gant in the Ninth Circuit, as in the present case, is deprived of a proper consideration and determination of such petitions—contrary to the obvious intent of Section 46(c) which provides that such petitions may be ordered *by a majority of the Circuit Judges of the Circuit.* Under the Ninth Circuit practice 3 judges and often 2 judges, as in the case at bar, may prevent the majority of the 7 judges from even being aware of the request for relief which the statute empowers the majority of 5 judges to grant.

We respectfully submit that petitions addressed to the full court for a rehearing en banc should be entitled to such consideration that a denial of the petition results *only when a majority of the individual judges are unwilling to grant it.*

The practice of the Ninth Circuit has received adverse comment—see the discussion of the *Independence Lead Mines* case in 63 Harvard Law Review 1449.

PETITION FOR REHEARING EN BANC WAS PARTICULARLY APPROPRIATE IN THIS CASE

In our petition below, we pointed out—as a ground for rehearing by the full court—the divergence of views expressed by the various judges of the Ninth Circuit on matters involved in the decision. We respectfully submit, as we did in our rehearing petition, that the view of the 2 judges who affirmed the judgment does not represent the view of the majority of the 7 judges—and that Petitioner has been the victim, with deference, of the happenstance that a majority of the 3 judges who sat represented a view that is the view of only a *minority* of the full court.

We bottom this suggestion on the expressed views of the members of the court below. We believe that *Southern*

Pacific Co. v. Guthrie, 186 F.2d 926, decided by the full court on rehearing, demonstrates that the result in the instant case reflects a view which is not the view of the majority of the members of this court. The only point considered in the *Guthrie* case, on rehearing, was whether the damages awarded were so excessive that the Court should exercise its appellate power of correction. There was no claim, or ground for claim, that there was any appeal to, or that the verdict was the result of, passion or prejudice. Three members of the Ninth Circuit, Chief Judge Denman and Judges Stephens and Mathews, expressed the view which we urge should have directed the result in this case.

Three other judges of the Ninth Circuit, Judges Pope, Healy and Orr, joined in an opinion by Judge Pope clearly intimating (but not in terms deciding) that the Court had power to deal with excessive verdicts but holding that the case was not one in which the power should be exercised. The case was one of the loss of a leg by a railroad engineer, —it was one in which, on any view, there was substantial damage. The appellant in that case did not argue that there was no substantial damage. It was not a case where, concededly—as in this case—there was no real damage in fact. Still in this posture the deciding vote was cast by Judge Bone, who went upon the ground that the Court had *no power to consider the question* at all and, quite logically, if this was his view, said that the Ninth Circuit decision in *Cobb v. Lepisto,* 6 F.2d 128, should be overruled.

A little over a month later the court below, by Chief Judge Denman and Judges Stephens and Orr, decided *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561. The action was for damages for the death of a son. On no rational basis

can the very real damage suffered there be compared with this case which Judge Pope has characterized as "thin." The court, upon the ground of excessiveness of the award (no appeals to prejudice were involved), was unanimous in reversing for a new trial unless plaintiffs consented to a reduction of the award by approximately three-sevenths. This excess, of about 42 per cent, the Court said, was "gross, and we think that the adjective 'monstrous' as used by the Supreme Court is applicable to American justice if it compel a defendant to pay such a gross excess which it does not owe."[1]

The case is significant for Judge Orr's concurrence. It indicates that he agreed in principle with the minority in the *Guthrie* case, and joined the majority, in that case, only because of a difference of view as to the weight of the considerations involved in that particular case. And, as his dissent in this case shows, Judge Pope's view is the same.

With deference, we suggest that other decisions of the court below indicate that had the case at bar been submitted to the full court, Chief Judge Denman and Judges Stephens, Mathews and Orr could well have been of the view that the result is so shocking that a proper exercise of their function would call upon them to relieve the appellant from a plain injustice. Judge Pope has spoken in this case. But the judgment is, nevertheless, affirmed by Judge Healy writing an opinion dictated by views, we submit with deference, *not* harmonious with the views of the majority of the Court—concurred in by Judge Bone, who has expressed the view that the question presented should not be

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[1]The trial judge whose denial of a motion for new trial was reversed in the Checketts case is the judge who denied the motion for new trial in this case.

considered at all. These 2 judges alone denied the petition for a hearing en banc. The granting of that petition was urged below because of our conviction that there is a cleavage based upon divergent views of the function of judges of the Ninth Circuit.

As to this case itself we submit that it should not be permitted to stand as a precedent for what can be allowed for punitive damages or as an invitation to counsel to get such results by a planned and sustained campaign of flagrant misconduct to arouse the passions and prejudices of the jury by suggestions by counsel, unsustained by the evidence and without intention or attempt to sustain them, —by practices universally condemned.

If the opinion of the majority in this case, that is, 2 judges out of 7, is to be the rule in the Ninth Circuit—when, if ever, can it be said that a record contains a basis for a claim that any verdict was given under the influence of passion and prejudice in the light of the persistent course of conduct pursued by counsel for respondent in propounding inflammatory questions to petitioner's witnesses ostensibly for the purpose of impeachment but never followed through?

In the majority opinion—in reference to the impeaching questions not attempted to be followed up by evidence that the witness had not in fact made the statement—it is stated:

> "We think one need not approve tactics of this sort in order to reject appellant's argument."

The affirmance of this case will be nothing less than an approval of such tactics—inviting, as here, grossly excessive verdicts. If this statement stands, no attorney need have any inhibitions in the trial of a case and may inten-

tionally ask any question, under the guise of impeachment, placing in the record by inference, any evidence no matter how damning and inflammatory it may be; and instead of courts administering justice under the law, justice will be perverted and something else will be administered instead of justice.

It serves little to *say* the court does not approve where its *holding does approve* the result.

The 2-judge panel opinion will clearly reflect itself in the future if allowed to stand. It marks a sharp departure—a decision in conflict with judicial antecedents, and with certain prospect of progeny.

These fundamental issues we *attempted* to place before *all* of the Ninth Circuit judges. Contrary to Respondent's assertion—and contrary to the provisions of Judicial Code section 46(c)—our petition for a rehearing en banc was presented to and denied by a *minority* of the judges.

We respectfully submit that this Court should issue its writ of certiorari, as prayed.

Dated: April 29, 1952

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